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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRED SMITH, Commissioner, Alabama Department of Corrections; and W. E. JOHNSON, Warden, Holman Unit,

Petitioners

v.

WAYNE EUGENE RITTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Charles A. Graddick
Alabama Attorney General

Edward E. Carnes*
Assistant Alabama
Attorney General

*Counsel of Record

250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

Counsel for Petitioners

1308

QUESTIONS PRESENTED

1. Did the court of appeals err in expanding federal habeas review to encompass facial attacks on state statutes, so that one to whom a statute is constitutional as applied may have his conviction or sentence set aside based upon how the statute might operate in some other case?

2. Did the court of appeals err in holding that Zant v. Stephens, 103 S.Ct. 2733 (1983), and Lockett v. Ohio, 438 U.S. 586 (1978), absolutely bar application of the harmless error rule to certain types of sentencing defects in capital cases regardless of the facts and circumstances?

3. Did the court of appeals err in holding that Alabama v. Evans, 103 S.Ct. 1736 (1983) (per curiam), which involved respondent's jointly tried co-defendant and the same issues, was not binding on it in this case?

4. Did the court of appeals err in holding, contrary to the decision of the Alabama Supreme Court, that Alabama's pre-Beck v. Alabama, 447 U.S. 645 (1980), capital sentencing procedures are unconstitutional?

PARTIES

The caption contains the names of all parties in the proceedings below.

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OPINIONS BELOW

1. The opinion of the United States District Court for the Southern District of Alabama, denying Respondent's petition for a writ of habeas corpus is reported as Ritter v. Smith, 568 F.Supp. 1499 (S.D. Ala. 1983), and is submitted as Appendix B, hereto.[1]

2. The opinion of the United States Court of Appeals for the Eleventh Circuit, reversing the decision of the district court insofar as it denied a new sentence proceeding, is reported as Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984)(per Johnson, J.). It is submitted as Appendix A, hereto. The order correcting one sentence of the original opinion on rehearing is not yet published, but is submitted as Appendix D, hereto.

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[1]The appendices to this petition are separately bound pursuant to Rule 21.1(k).

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was issued on February 27, 1984. See Appendix A, p. 1a, infra, and Appendix C, p. 193a, infra. On April 9, 1984, petitioners' rehearing petition was granted to the extent that one sentence of the opinion was changed for clarification purposes, but the remainder of the opinion and the judgment was left unchanged. See Appendix D, p. 195a, infra.

The jurisdiction of this Court is based on 28 U.S.C. §§1254(1) and 2101(c), the federal appeals court having reversed in part the district court's decision in a civil proceeding brought under 28 U.S.C. §2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. §2254, which is reproduced as Appendix E, hereto, pp. 197a- 203a, infra.

2. Code of Alabama 1975, §§13-11-1 through 13-11-9, which is reproduced as Appendix F, hereto, pp. 203a - 215a, infra.

3. The Eighth Amendment to the United States Constitution which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE[1]

A. THE CRIME AND CRIME SPREE

On December 1, 1976, respondent Ritter was paroled from an Indiana prison where he had been serving a sentence for armed robbery. (Tr. 217, 293, 338) While in prison, he and another inmate, John Louis Evans, III, agreed that once released they would "jump parole" and go on a cross-country crime spree together. (Tr. 211, 322, 338) They did so, leaving Indianapolis on Christmas Day, 1976. (Tr. 322) In the next two-and-a-half months, Ritter and Evans committed

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[1]The following designations are used herein: "R. ___" refers to the clerk's record in this habeas proceeding; "H.Tr. ___" to the transcript of the evidentiary hearing in the district court on the merits of the habeas petition; and "Tr. ___" to the transcript of respondent's state court trial, which was introduced into evidence at the evidentiary hearing in the district court (H.Tr. 302-03).

more than three dozen violent felonies, including robbery, kidnapping, extortion, and murder, in seven different states (App. 69a); Hopper v. Evans, 456 U.S. 605, 606 (1982).[2] In each of those crimes, Ritter was armed with a loaded, deadly weapon. (App. 98a).

One of their crimes was the robbery and murder of Edward Nassar in Mobile on January 5, 1977. (App. 69a). Ritter and Evans robbed Nassar's Pawn Shop to secure money and more weapons. (Tr. 212-14, 218-21, 324, 339-40) During the robbery, Nassar dropped down behind the store counter and started crawling away. (Tr. 219, 340-41) Evans leaned over the counter and shot Nassar in the back,

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[2]This Court's decision in Hopper v. Evans, supra, involved Ritter's co-defendant. The facts stated in that opinion are equally applicable to this case because they were drawn from the same joint trial and sentence proceeding record. (Tr. 1-371)

while Nassar's seven- and nine-year old daughters watched in horror. (Tr. 101, 113, 244, 324-25, 341) Nassar writhed in agony and died later that day. (Tr. 74, 102, 113, 138) Ritter and Evans committed another robbery while leaving Mobile, and then carried their crime spree to other states. (Tr. 289, 295-97, 342)

The only reason Ritter did not fire the shot that killed Nasser is that Evans was in his line of fire and beat him to it. (App. 97a - 105a). Ritter and Evans had previously discussed the possibility that they might have to kill someone in one of their robberies, and they had agreed to do so if necessary. (App. 99a - 101a, 104a, 110a - 111a, 116a - 117a) Ritter stood ready, willing and able to assist Evans in the killing. (App. 99a - 117a). It was "really simply a matter of logistics that Ritter did not fire his weapon" (App. 107a - 108a) and "the only

reason why he did not [kill Nasser] is that John Evans relieved him of that burden" (App. 117a). As the district court concluded: "[i]n essence, Ritter was not so much a non-triggerman, but was rather an unneeded triggerman." (Id.)

Ritter and Evans were finally captured by F.B.I. agents in Little Rock, Arkansas, on March 7, 1977. The only reason Ritter was captured alive was that the agents surprised him, and upon being captured he expressed disappointment that he had not been killed. (App. 70a - 71a).

B. RITTER'S COURSE OF CONDUCT AFTER CAPTURE AND IN STATE COURT

Ritter voluntarily confessed to the F.B.I. agents in Arkansas his guilt of the many violent crimes he and Evans had committed, including the robbery-murder of Nassar. (App. 71a) Ritter told the agents

he would have killed Nassar if Evans had not done so. (App. 115a) He also told the agents he planned to seek execution when he returned to Alabama. (App. 72a - 73a) Soon thereafter, Ritter waived extradition and on the flight back to Alabama told a state law enforcement officer that he planned to plead guilty and seek execution. (App. 73a - 75a)

The course of conduct Ritter followed at trial was summarized by the district court as follows:

> Continuously, from the first day he arrived back in Alabama, which was on or before March 11, 1977, throughout his entire trial and sentencing proceedings, petitioner intentionally and stubbornly pursued a course of actively assisting the prosecution in proving beyond a reasonable doubt that he was guilty of the capital offense and that he deserved the death penalty. He did so as early as in his formal interview with Mobile police officers; at the Grand Jury, before whom he insisted on appearing; at arraignment where he entered an oral guilty plea;

> and at trial when he entered a written guilty plea and took the stand to testify against himself. When the jury verdict convicting him of the capital offense and fixing his punishment at death was read, petitioner turned, smiled, and gave a "thumbs up" gesture of approval.

(App. 75a - 76a) (citations deleted).

Ritter voluntarily appeared before the grand jury against the advice of his attorney and freely testified at length about his guilt and desire to be executed. (Tr. 24, 338-47) (App. 99a) Ritter told the grand jury that: he and Evans had made a pact to assist each other in any necessary killings; he would have shot Nassar himself if he had had the chance; if he ever got out he would go back to robbery and would kill if necessary in any future robbery. (Tr. 341-45) (App. 99a - 101a)[3]

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[3]Ritter's grand jury testimony was introduced without objection during the sentence hearing. (Tr. 229-233) (App. 89a)

Ritter was indicted by the Mobile County Grand Jury for the Code of Alabama 1975, §13-11-2(a)(2) capital offense of robbery-intentional killing. (Tr. 20) At arraignment he pleaded guilty, and his guilty plea was accepted. (Tr. 21, 27, 59-60) However, in compliance with Alabama law, the trial court ordered the matter submitted to a jury, anyway. (App. 101a - 102a)

A psychiatric examination revealed that Ritter was "of bright normal intellect," was "competent, rational, and able to stand trial," and thoroughly understood the nature and consequences of his actions. (Tr. 22-3, 28, 57, 259) It also found that Ritter, "sincerely seeks the death sentence, preferring this to a long prison sentence." (Tr. 259)

Ritter and Evans were jointly tried before and convicted by a jury of the capital

offense of robbery-intentional killing. (Tr. 29) During the trial, after the State had presented its evidence, Ritter tendered a written guilty plea which was admitted into evidence and went to the jury. (App. 88a). Ritter then voluntarily took the witness stand, against the advice of his attorney, in order to ensure that he would be convicted and sentenced to death. (Tr. 217-21); (App. 102a - 105a) Ritter's testimony before the trial jury and sentencing judge included the following sworn statements:

> Q: I want you to turn and look at the Jury, if you will, Mr. Ritter, and tell that jury if you had an opportunity, to kill Mr. Nassar, would you have killed him?
>
> A: My gun was loaded, and I would have killed him, yes.
>
> Q: You stood ready to assist your cohort in crime in anyway you could, and that went as far as

shooting Mr. Nassar in the back if you had to do so.

A: Yes. John was in my line of fire, but I was there in case he missed.

Q: And if you walked out of this courtroom here today, or if you were ever allowed to walk out of any courtroom, any penitentiary from now until any time in the future, what profession would you start back into?

A: Armed robbery.

Q: And if you had to kill again, would you do it?

A: If it became necessary, I would.

(Tr. 221) (App. 104a - 105a). Ritter also made it clear to the trial jury and sentencing judge that he wanted a death sentence:

Q: You wish to die by death by electrocution?

A: Yes, I do.

Q: Are you asking this jury to do it for you?

A: I am demanding they do it to me.

. . . .

Q: And you want death by electocution?

A: Yes, I do.

Q: And you don't want this Jury to waste any time in going back there and returning a verdict of guilty and sentencing you to die by electrocution?

A: No.

(Tr. 220-21)

Indeed, Ritter even threatened to get out and harm the jury if he was not sentenced to death:

Q: Mr. Ritter, do you want to say anything to these people sitting in the Jury Box as to what you want them to do when they go back there?

A: Well, I think there are two considerations. First, we did kill Mr. Nassar. We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen. We

> did kill him, so, really, the only thing you can come back with is the death penalty. And the other consideration is, if you give me life, or if I got life imprisonment, I could get out in ten or fifteen years, and when I got out, I know where everybody on the Jury lives, and I wouldn't appreciate being in prison for ten or fifteen years, so I think I would have to come after you. That's about it.

(Tr. 219-220) Furthermore, "[a]t the time he threatened the jury, he was smiling or grinning and appeared to be menacing and extremely dangerous." (App. 88a - 89a).

The trial court instructed the jury that it could not convict Ritter of the capital offense unless it found beyond a reasonable doubt that he had possessed "an actual or positive intent to kill." (Tr. 233) (App. 106a). Within fifteen minutes after retiring to deliberate, the jury returned with a verdict convicting Ritter of the capital offense

and "fixing" his sentence at death. Ritter gave a "thumbs up" gesture of approval upon hearing the verdict. (App. 89a).

C. THE SENTENCE PROCEEDINGS

Under the applicable state law, the trial court judge rather than the jury was the actual sentencing authority, and the language in the jury's guilt stage verdict was "in no way binding on the trial court in the latter's role as the sentencing authority." Ritter v. State, 429 So.2d 928, 935-936 (Ala. 1983). Accordingly, the day after Ritter was convicted of the capital offense by the jury, a sentence hearing was held before the trial judge sitting without a jury. (Tr. 229-37) As the district court found:

> In addition to the evidence which was presented during the guilt stage of the trial, at the sentencing hearing the State introduced the following: The Grand Jury testimony of petitioner and

> Evans; petitioner's prior record; an additional lengthy confession petitioner gave the FBI which recounted his many criminal activities; a summary of the crime spree based on their statements to Mobile police officers; and a number of warrants received from other states indicating that they would attempt to extradite and prosecute petitioner if he was not sentenced to death in Alabama. All of this additional evidence was presented without objection. Petitioner submitted no evidence at the sentencing hearing.

(App. 89a - 90a) (citations to exhibits deleted). Ritter's attorney told the court: "Mr. Ritter says that he wants the record to stand as is." (Tr. 236-37)

After a short recess, the trial court entered a written sentence order finding that the aggravating circumstances present "far outweigh" the mitigating circumstances. (Tr. 246) It adjudged Ritter guilty of the capital offense of robbery-intentional killing and sentenced him to death. (Tr. 246-47) (App. 90a-92a).

D. THE STATE APPELLATE COURT PROCEEDINGS AND FACTFINDINGS

Under Alabama law, a death sentence case is automatically appealed irrespective of the wishes of the defendant. Code of Alabama 1975, §13-11-5. The Court of Criminal Appeals affirmed Ritter's conviction and death sentence. Evans and Ritter v. State, 361 So.2d 654 (Ala.Cr.App. 1977). In doing so, the court found that Ritter had been well represented by his attorney who had repeatedly advised him against the self-destructive course he pursued at trial. Id., at 661-62. The state appellate court also stated:

> Additionally, this Court has weighed the various factors presented by this record, and is of the opinion that the punishment here imposed fits the crime for which each appellant has been found guilty thereof.
>
> A careful reading of this record convinces this Court that

> each appellant has here followed the course of action pursued at trial with full knowledge of its consequences. Further writing on this point would serve no worthwhile purpose. This Court is convinced that each appellant is sincere in seeking the death sentence, preferring this course to a long prison sentence.

Id., at 662.

The Alabama Supreme Court affirmed other aspects of the case but remanded it to the Court of Criminal Appeals for determination of whether a non-triggerman like Ritter could be sentenced to death. Evans and Ritter v. State, 361 So.2d 666 (Ala. 1978).[4]

On remand, the Court of Criminal Appeals again upheld Ritter's conviction even though he was not the actual triggerman. Ritter v. State, 375 So.2d 266 (Ala. Cr.App. 1978). The court explained that the felony

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[4]It was some time after that decision that Ritter changed his mind and decided he did not want to be executed after all.

murder doctrine had not been applied, and the evidence had proven that Ritter had the necessary intent to kill, because it was "really simply a matter of logistics that Ritter did not also fire his weapon." Id., at 267. The court also reweighed the aggravating and mitigating circumstances and reaffirmed the death sentence. Id.

The Alabama Supreme Court affirmed that decision. Ritter v. State, 375 So.2d 270 (Ala. 1979). It held that Ritter, who "encouraged and supported the killing and was present with Evans' knowledge to render assistance should it become necesary," had possessed the requisite intent to kill. Id., at 273-75; It also held his death sentence was not disproportionate, because "[b]y Ritter's own statement it was mere fortuity which made John Evans the triggerman and not Ritter." Id., at 275.

In Ritter v. Alabama, 447 U.S. 625 (1980), this Court remanded the case back to the Alabama Supreme Court for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980). There then followed a series of four more Alabama Supreme Court opinions and two more orders from this Court, the net effect of which was to establish that the Alabama Supreme Court thought Beck v. Alabama, supra, required reversal of Ritter's conviction until Hopper v. Evans, 456 U.S. 605 (1982), convinced it to the contrary.[5]

In its last decision in this case, Ritter v. State, 429 So.2d 928 (Ala. 1983), the Alabama Supreme Court stressed that "[t]he uniqueness of the facts of Ritter's case

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[5]This Court's orders and the Alabama Supreme Court's opinions are listed in that court's fourth and final opinion in the case, Ritter v. State, 429 So.2d 928, 931-932 (Ala. 1983).

merit particular emphasis," id., at 932, and it upheld his conviction and sentence. In rejecting Ritter's attack on the statutory sentencing procedures, the Court held that "in light of the particular facts in this case" those procedures were not prejudicial to Ritter, and he was therefore constitutionally sentenced. Id., at 935. Ritter did not seek to have this Court review that decision on certiorari, and chose instead to file a 28 U.S.C. §2254 proceeding.

E. THE FEDERAL DISTRICT COURT PROCEEDINGS AND FACTFINDINGS

Ritter filed a habeas corpus petition with the United States District Court for the Southern District of Alabama. (R. 1-67) Included in it was a claim that the Alabama sentencing procedures in effect at the time of Ritter's trial were unconstitutional because of the statutory requirement that the

jury's verdict convicting a defendant of a capital offense contain formal language "fixing" his punishment at death, even though the trial judge was the actual sentencing authority. (R. 16-20)[6] The State, through its named respondents (petitioners here), filed an answer which denied that the sentencing provisions were unconstitutional, and further averred that: "even if there were some error or defect in the capital sentencing procedures used in [Ritter's] case, any such error or defect was harmless beyond a reasonable doubt." (R. 78-79)

An evidentiary hearing was held on the merits of the petition, and Ritter, his trial counsel, and others testified. (H.Tr. 1-326) The district court entered judgment denying

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[6]This was the same claim the Alabama Supreme Court had rejected "in light of the particular facts in this case." 429 So.2d at 935.

the habeas petition with prejudice (R. 184), and it issued a scholarly opinion containing detailed findings of fact and conclusions of law. Ritter v. Smith, 568 F.Supp. 1499 (S.D. Ala. 1983) (App. B).

The district court found as a fact that:

> The reason that [Ritter] is facing a death sentence is not the result of any peculiarities of the capital punishment statute under which he was tried. Rather, [Ritter] is facing a sentence of death as a result of his own criminal conduct and his having adopted a legal strategy, however unwise, which was adopted freely, knowingly, and voluntarily by [Ritter] himself for which no other person or factor is responsible. The Court cannot help but note that as [Ritter's trial attorney] testified at the evidentiary hearing, [Ritter] obtained exactly what he wanted.

(App. 85a - 86a). The district court agreed with the Alabama courts that the motivation behind Ritter's self-destructive strategy had been "his preference for death over a

long prison sentence or series of long prison sentences." (App. 81a - 82a)[7]

The district court noted that Ritter's sentence procedure claim "in the abstract, appears to be substantial" and that such a claim might be successful in a case "where the sentencing decision presented a close question." (App. 156a). The court nonetheless rejected the claim as applied to Ritter, upheld the validity of his sentence, and denied habeas relief to him. It did so because it found Ritter had not been harmed or prejudiced by the alleged defects in the sentence procedures and that any defect in them was harmless beyond a reasonable doubt in his case.

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[7]The district court found that the only other factor that may have contributed to Ritter's course of conduct was "his appetite for publicity and notoriety and his desire for news media attention." (App. 82a)

The district court found as a fact that: "[g]iven petitioner's unusual, even self-destructive behavior in front of the jury in which he threatened the jury and admitted his guilt, including making the statement that he would have shot Edward Nassar had Evans not done so, it is inconceivable that a jury would not have recommended the death penalty." (App. 150a - 151a) The court also found that:

> At the evidentiary hearing held in this habeas petition, petitioner's own trial counsel testified that in his opinion petitioner would still have been sentenced to death even if the mandatory jury verdict form requirement had not existed. (Testimony of attorney Stephens at the evidentiary hearing.)
>
> Based upon a careful examination of the state trial court record and consideration of the testimony presented at the evidentiary hearing in this case this Court finds beyond a reasonable doubt that there is no evidence that petitioner was harmed or prejudiced in any way by the

> existence of the mandatory jury verdict form requirement or any other aspect of the sentencing procedure employed in this case.
>
> Based upon a careful examination of the state trial court record and consideration of the testimony presented at the evidentiary hearing, this Court finds beyond a reasonable doubt that petitioner would still have been sentenced to death even if the mandatory jury verdict form requirement and other aspects of the sentencing procedure about which he now complains had not been employed at his trial.
>
> Given the facts and circumstances of this case, including but not limited to the fact that the petitioner threatened to harm the jury if he was not sentenced to death, this Court finds beyond a reasonable doubt that no sentencing authority could reasonably have sentenced petitioner to anything other than death regardless of the sentencing procedure employed.

(App. 94a - 96a).

In addition to its harmless error holding, the district court held that Ritter was not entitled to relief because a habeas petitioner must plead and prove prejudice, and

habeas relief should be limited to cases involving "fundamental miscarriages of justice." (App. 159a). The court found that "the statute, as applied in this particular case, did not prejudice petitioner's rights, and conclude[d] beyond a reasonable doubt, his rights were not so prejudiced." (App. 158a) It further concluded that the claimed statutory defects "either singly or in combination, created no fundamental miscarriage of justice." (App. 159a - 160a)

Finally, the district court also held, as an additional independent basis for its decision, that this Court's decision in Alabama v. Evans, 103 S.Ct. 1736 (1983) (per curiam), foreclosed Ritter's sentence procedure claims, because in Evans this Court held that identical sentence procedure claims raised by Ritter's co-defendant had been "conclusively resolved in prior proceedings." (App. 149a - 150a)

F. THE FEDERAL APPEALS COURT DECISION AND HOLDINGS

The United States Court of Appeals for the Eleventh Circuit (per Judges Johnson, Anderson and Tuttle), reversed the district court decision insofar as the sentence was concerned and ordered the writ to issue overturning the death sentence. Ritter v. Smith, 726 F.2d 1505 (1984). (App. A) The appeals court held that this Court's decision in Alabama v. Evans, 103 S.Ct. 1736 (1983), was not binding on it because that decision was not "on the merits." (App. 22a, 51a - 52a)

The appeals court also held that a habeas petitioner could challenge a state statute on its face, even if it did not operate to harm him, and in such a case could claim the benefit of any unconstitutional effect the statute might have in

another case. (App. 58a). Acting pursuant to the license it had granted itself, the court held "the 1975 Alabama death penalty statute's sentencing procedures facially unconstitutional." (App. 39a)

The federal appeals court did not disturb the district court's extensive findings that any defect in the sentence procedures was harmless beyond a reasonable doubt in Ritter's case because of the extraordinary course of action he pursued before and during trial. Instead, the court held that the harmless error rule was totally inapplicable and that reversal of the sentence was required no matter how harmless the procedural errors were in this specific case. (App. 39a - 47a). It interpreted Zant v. Stephens, 103 S.Ct. 2733 (1983), and Lockett v. Ohio, 438 U.S. 586 (1978), to forbid application of the harmless error rule to

any error involving injection of "a constitutionally impermissible and irrelevant consideration into the sentencer's exercise of that discretion in determining whether to impose a sentence of death." (App. 45a - 46a).

REASONS FOR GRANTING THE WRIT

This case involves an unprecedented decision. No federal appeals court has ever before expanded the scope of 28 U.S.C. §2254 proceedings to encompass facial attacks on state statutes, thereby permitting a habeas petitioner to invoke the possible operation of the statute in some other case to invalidate the otherwise valid judgment in his own case. Nor has any other court interpreted this Court's decisions to absolutely bar application of the harmless error rule to certain types of capital sentencing defects,

regardless of the facts and circumstances. The Eleventh Circuit Court of Appeals did both those things in this case. It also misconstrued Alabama v. Evans, 103 S.Ct. 1736 (1983), which involved respondent's co-defendant, and it struck down a state statutory provision which had been upheld by the Alabama Supreme Court. The reasons for granting the writ are several.

I. THE HOLDING THAT FACIAL ATTACKS ON STATE STATUTES ARE COGNIZABLE IN FEDERAL HABEAS PROCEEDINGS CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT AND WILL HAVE SERIOUS REPERCUSSIONS

In the district court, Ritter downplayed the facts of his own case and launched a facial attack on the sentencing provisions of Alabama's pre-Beck v. Alabama, 447 U.S. 625 (1980), capital punishment statute. The district court recognized that

the claim that those provisions were unconstitutional appeared to be substantial "in the abstract" and that they "might in some circumstances prejudice a defendant where the sentencing decision presented a close question." (App. 156a) It nonetheless rejected the facial attack approach and held that federal habeas relief should be limited to cases involving fundamental miscarriages of justice, a limitation which requires the petitioner to plead and prove prejudice from any real or imagined constitutional defect. (App. 159a)

After carefully examining the unusual facts and circumstances of Ritter's case, see pp. 4 - 16, supra, and after hearing evidence on the issue, the district court denied the writ because:

> the Court finds that the statute, as applied in this particular case, did not prejudice petitioner's rights, and concludes

> that, beyond a reasonable doubt his rights were not so prejudiced.

(App. 158a) (emphasis in original). That conclusion was based on express factfindings that: Ritter would still have been sentenced to death even if the procedural defects he complained of had not existed; no sentencing authority could reasonably have sentenced him to anything other than death regardless of the procedures employed; and it is utterly inconceivable that the jury at Ritter's trial would have reached any other conclusion. (App. 94a - 96a, 150a - 151a) The court found each of those factfindings beyond a reasonable doubt. (App. 95a - 96a, 150a - 151a)[8]

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[8]Indeed, Ritter's own trial counsel testified that Ritter would still have been sentenced to death if the claimed defect had not existed. (App. 94a)

The federal appeals court did not overturn any of those factfindings, nor did it question the conclusion that the statute was not unconstitutional as applied. Instead, it held that the district court erred in judging the statute only as applied in Ritter's case. Treating the proceeding like a declaratory judgment action, the appeals court held the statute facially unconstitutional. (App. 39a). It said:

> because the petitioner challenges the statute on its face and not as applied to him, the influence of the constitutionally impermissible factor of the jury's mandatory death sentence on the judge's sentencing determination in a close case requires a finding of facial unconstitutionality.

(App. 58a) The court went on to hold that since in its opinion the harmless error rule was inapplicable, see pp. 43 - 53, infra, the facial unconstitutionality of the statute required that Ritter's sentence be set aside. (App. 39a - 47a)

The issue of whether facial attacks on state statutes are cognizable in 28 U.S.C. §2254 proceedings could not be presented any more clearly, because the court of appeals left undisturbed the district court's holding that the statute was not unconstitutional as applied in Ritter's particular case. His sentence was set aside solely because of the effect the statute might have in some other case. The appeals court decision should be reversed, because it is contrary to controlling decisions of this Court both on standing in general and on the scope of federal habeas review in particular, as is discussed below.

A. The Constitutional Adjudication Standing Decisions

This Court has repeatedly held that, except in the First Amendment area, a federal court lacks the authority to entertain

a facial attack on a state statute. In Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973), this court explained that: "[e]mbedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." That fundamental rule of law was recognized and applied in United States v. Raines, 362 U.S. 17, 21 (1960), and was reiterated in New York v. Ferber, 458 U.S. 747, 767-768 (1982), and Murphy v. Hunt, 455 U.S. 478, 481-482 n. 5 (1982).

The rule is based on Article III jurisdictional restrictions as well as important prudential restraints. E.g., New York v.

Ferber, 458 U.S. at 767-768 & n. 20 (1982); United States v. Raines, 362 U.S. at 21. Because of such limitations, the bottom line of this Court's decisions is that: "if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." Ulster County Court v. Allen, 442 U.S. 140, 155 (1979). The decision below changes that. Under it, a litigant may gain relief based upon the effect a statute has in some other case regardless of how it operates in his own case.

B. The Federal Habeas Decisions

The fact that this case involves a 28 U.S.C. §2254 proceeding compounds the error of the decision below, because:

> it must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. ...

Barefoot v. Estelle, 103 S.Ct. 3383, 3391 (1983). Accord, e.g., Engle v. Isaac, 456 U.S. 107, 134-135 (1982) ("the burden of justifying federal habeas relief for state prisoners is 'greater than the showing required to establish plain error on direct appeal.'"). The holding below that facial attacks on state statutes are cognizable in habeas proceedings and that ordinary standing restraints are inapplicable is

fundamentally inconsistent with any notion that habeas review is "secondary and limited."

The holding also flies in the face of the well-recognized doctrine that because of society's interest in the finality of judgments, a showing of prejudice is a threshold requirement for collateral relief. See, e.g., United States v. Frady, 456 U.S. 152, 175 (1982); Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Hutchins v. Garrison, 724 F.2d 1425, 1434 (4th Cir. 1983) (capital case); Stanley v. Zant, 697 F.2d 955, 972 (11th Cir. 1983) (capital case); Ross v. Hopper, 716 F.2d 1528, 1540 (11th Cir. 1983) (capital case). It simply makes no sense to say that a habeas petitioner must prove that he was prejudiced by a claimed defect, and to also say he can attack a

statute on its face irrespective of how it operated in this case.

Moreover, the decision below is flatly contrary to this Court's decision in Jaehne v. New York, 128 U.S. 189 (1888). In Jaehne this Court held that even if a state statute might apply unconstitutionally in some other case, a petitioner to whom the statute was not unconstitutionally applied was entitled to no federal habeas relief. Id., at 189. That decision has never been overruled, and its principle has been honored in other circuits. E.g., Hutchins v. Garrison, 724 F.2d 1425, 1431 (4th Cir. 1983) (capital habeas case) ("the petitioner cannot rely on the rights of third parties"). The Jaehne doctrine was not honored by the appeals court in this case.

Not only is the decision below clearly wrong, it will also have deleterious effects

on our system of federalism. "Federal habeas has been a source of friction between state and federal courts," Sumner v. Mata, 449 U.S. 539, 550 (1981), and expansion of the writ "inflicts substantial costs on society, our system of justice and our federal fabric," Rose v. Mitchell, 443 U.S. 545, 585-586 (1979) (Powell, J., concurring). In Engle v. Isaac, 456 U.S. 107 (1982), this Court listed the significant costs federal habeas review of state court judgments entails, id., at 126-128, and indicated that habeas relief should be limited to instances involving a fundamental miscarriage of justice, id., at 135. Accord, Powell, Honorable Lewis F., Speech To Eleventh Circuit Conference (May 1983), at 7. The district court relied on that indication in this case. (App. 159a - 160a). The appeals court disregarded it.

By incorporating what amounts to a declaratory judgment cause of action into the fabric of habeas corpus law, the decision below has expanded significantly the scope of such review and the costs entailed for our society. Moreover, unless corrected by this Court, the decision will mark the beginning of a trend away from the restrictions on habeas review which this Court has labored to establish in recent years. As Mr. Justice Blackmun has reminded us, "[a] trend of this kind, once begun, easily assumes startling proportions." Braden v. Judicial Circuit Court of Kentucky, 410 U.S. 484, 501 (1973) (concurring opinion).

II. THE HOLDING THAT ZANT v. STEPHENS, 103 S.Ct. 2733 (1983), AND LOCKETT v. OHIO, 438 U.S. 586 (1978), ABSOLUTELY BAR APPLICATION OF THE HARMLESS ERROR RULE TO CERTAIN TYPES OF CAPITAL SENTENCING DEFECTS IS A SERIOUS MISINTERPRETATION INVOLVING AN IMPORTANT QUESTION OF LAW

The second independent basis for certiorari in this case is the harmless error holding below. The extraordinary facts of this case which make any sentence other than death utterly inconceivable are set out on pp. 4 - 16, supra. After carefully reviewing those facts and hearing testimony on the issue, the district court found beyond a reasonable doubt that: there is no evidence Ritter was harmed or prejudiced by the claimed defects in the sentencing procedures; he would still have been sentenced to death even if the claimed defects had not existed; and "no sentencing authority could

reasonably have sentenced petitioner to anything other than death regardless of the sentencing procedures employed." See pp. 25 - 26, supra. Applying this Court's decisions, the district court concluded that even if the statutory sentencing procedures were unconstitutional, the error or defect was harmless beyond a reasonable doubt in this unusual case. (App. 145a - 151a, 158a - 160a)

The court of appeals did not disturb the district court's factfindings or its conclusion that any error or defect was harmless. Instead, it concluded that the harmless error rule was inapplicable and Ritter's sentence was due to be set aside regardless of the facts. The court held Zant v. Stephens, 103 S.Ct. 2733 (1983), and Lockett v. Ohio, 438 U.S. 586 (1978), absolutely forbid application of the harmless

error rule to facial defects in capital sentencing provisions if those defects inject constitutionally impermissible or irrelevant considerations into the sentencing decision. (App. 39a - 47a) That decision is wrong for four independently adequate reasons.

First, Zant did not hold that the interjection of constitutionally impermissible or irrelevant considerations into the sentencing process can never be harmless error. Zant held that the harmless error doctrine was applicable to the use of unconstitutional aggravating circumstances at a capital sentence proceeding, see, Barclay v. Florida, 103 S.Ct. 3418, 3425 n. 8 (1983), but it did not hold that the doctrine was inapplicable to other types of constitutional defects in sentencing.

This Court did say in dictum that if Georgia had "attached the 'aggravating'

label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process" due process would require that the death sentence be set aside. Zant v. Stephens, 103 S.Ct. at 2747. But even that dictum, which the court of appeals seized upon, is not applicable here because there is no suggestion that any of Alabama's eight aggravating circumstances (App. 212a - 213a) are constitutionally impermissible or totally irrelevant. The four aggravating circumstances found by the trial judge to "far outweigh" any mitigating circumstances in this case (App. 90a - 91a) are all constitutionally proper.

Moreover, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and broad language from an earlier decision involving different facts is not

controlling. Zenith Radio Corp. v. United States, 437 U.S. 443, 459-462 (1972); accord, e.g., Hopper v. Evans, 456 U.S. 605, 610 (1982).

The court of appeals' reliance on Lockett v. Ohio, supra, is even more misplaced. Evidence of character, record, and circumstances of the offense was excluded from sentencing in that case involving a 21 year-old offender with a relatively good prior record who lacked the intent to kill. The harmless error rule was not even mentioned in Lockett, because the exclusion, if error, was clearly not harmless in that case. Ohio did not even argue to the contrary.

The second reason the harmless error holding below is wrong is that it is contrary to Hopper v. Evans, 456 U.S. 605 (1982). In Beck v. Alabama, 447 U.S. 625

(1980), this Court held the preclusion clause in Alabama's capital statute unconstitutional because it interjected irrelevant considerations into the decision making process thereby introducing a constitutionally intolerable level of uncertainty and unreliability, id., at 642-643. Nonetheless, in Hopper v. Evans, supra, this Court applied the harmless error rule to that facial defect which involved irrelevant considerations interjected into the decision making process.

The court of appeals' attempt to distinguish Hopper v. Evans, because it involved facial defects affecting the guilt stage rather than the sentence stage (App. 58a - 59a) is unconvincing at best. This Court held in Beck that the same rules apply to defects in capital guilt stage procedures that apply to the sentencing stage. 447

U.S. at 638. That makes eminently good sense, because no one can be sentenced to death without first being convicted of a capital offense. Indeed, if there is to be any difference in the doctrines applicable to the two stages of a capital trial, the court of appeals has it upside down, because "in general sentencing decisions are accorded far greater finality than convictions." Zant v. Stephens, 103 S.Ct. at 2755 (Rehnquist, J., concurring).[9]

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[9]The court of appeals citation of Ramos v. California, 103 S.Ct. 3446, 3456-57 (1983), for the proposition that there is a "fundamental difference" between the two stages of a capital trial (App. 59a) is a non sequitur. Ramos says the difference is that the guilt stage involves a central issue while the sentence stage involves a myriad of factors and countless considerations, id., which makes it less likely that the attention of the sentencing authority would be diverted from its proper role by injection of an irrelevant factor. Therefore, if Ramos indicates anything on the subject, it indicates that the harmless error rule is even more appropriate for the sentence stage than the guilt stage.

The third reason the decision below is wrong is that it is contrary to Wainwright v. Goode, 104 S.Ct. 378, 383 (1983), which held that capital sentencing error at the trial level could be rendered harmless by independent appellate review of the death sentence. See also, Zant v. Stephens, 103 S.Ct. at 2749. In this case the Alabama Court of Criminal Appeals twice independently weighed the aggravating and mitigating circumstances and upheld the propriety of Ritter's sentence. Evans and Ritter v. State, 361 So.2d 654, 662 (Ala.Cr.App. 1977); Ritter v. State, 375 So.2d 266, 268 (Ala.Cr.App. 1978). That appellate review, which the court below did not even consider, rendered any defect in the trial stage sentencing procedures harmless.

The fourth reason the decision below is wrong is that it simply does not make sense.

It cannot be overemphasized that the court of appeals left intact the district court's findings beyond a reasonable doubt that Ritter would still have been sentenced to death even if the claimed defects had not existed, and no sentencing authority could have reasonably sentenced him to anything else regardless of the procedures involved. Given those undisturbed factfindings there is simply no logical reason, short of a flanking opposition to the death penalty itself, to overturn the sentence in this case. This is precisely the type of extreme fact situation in which the harmless error rule should operate.

The issue is worthy of review because the application of the harmless error to capital sentencing errors is important. As Chief Judge Godbold observed in Ford v. Strickland, 696 F.2d 804, 823 (11th Cir.

1983) (concurring opinion), given the fluidity of the constitutional doctrines in this area, absent an effective harmless error rule "the death sentencing process will become so time-consuming and cumbersome that the death penalty will be imposed rarely and freakishly in violation of Furman v. Georgia, 408 U.S. 238 (1972)." The harmless error rule is also important because it forces courts to focus on facts, and "[u]ltimately our rules, our justice is judged on the actual facts," O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983) (concurring opinion of Higginbotham, J.).

Moreover, the prior decisions of this Court "are not completely consistent regarding the effect of constitutional error in sentencing proceedings on the sentence imposed on the defendant." Zant v. Stephens, 103 S.Ct. at 2755 (Rehnquist, J.,

concurring). The remarkable clarity with which the issues are drawn in this case make it an ideal vehicle for this Court to review and reconcile the decisions in this important area of the law.

III. THE HOLDING THAT THIS COURT'S DECISION IN ALABAMA v. EVANS, 103 S.Ct. 1736 (1983), IS NOT BINDING ON THE MERITS IS WRONG

The third separate basis for certiorari is that the decision below is in conflict with the decision this Court reached in the case of Ritter's co-defendant, John Louis Evans. Evans and Ritter were jointly tried and convicted by the same jury for the same crime and sentenced by the same judge under the same sentencing procedures. In Alabama v. Evans, 103 S.Ct. 1736 (1983), this Court vacated a stay of execution issued by the district court to permit it to consider claims which included precisely the same sentence procedure issues Ritter raised in

this case. See, Alabama v. Evans, supra, Petition for Writ of Habeas Corpus, at 7 - 10.[10]

In this case, the district court held as an additional basis for denying the writ that this Court's decision in Alabama v. Evans was controlling. (App. 149a - 150a) The court of appeals disagreed, saying both that it was not bound by decisions this Court renders in stay of execution proceedings (App. 22a, 52a), and that the Evans decision was not on the merits anyway (App. 22a - 27a). The court of appeals held, in effect, that Evans was unconstitutionally sentenced to death, but he was allowed to be executed by this Court because of his prior legal maneuvers.

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[10]The habeas petition and all other papers in the Evans case were requested by and submitted to this Court in Alabama v. Evans, supra.

While it is true that Alabama v. Evans involved a second habeas petition, this Court's opinion did not state that it acted under Habeas Rule 9(b) or because of abuse of the writ, those terms not even being mentioned in the opinion. Instead, this Court said that the sentence procedure issues involving Alabama's pre-Beck statute had been "conclusively resolved in prior proceedings." 103 S.Ct. at 1739. It also addressed in a manner which was clearly on the merits the only new issue Evans raised. Id., at 1738-39.

If the decision in Alabama v. Evans is not on the merits and not binding on lower courts, then the court of appeals decision should still be reviewed and reversed for the three other reasons stated in this petition. Those grounds of review are not dependent upon this one. On the other hand,

if this Court did in fact conclusively resolve the sentence procedure issues in Evans (on harmless error or other grounds), then the court of appeals decision should be reversed on that ground as well.

IV. THE HOLDING THAT ALABAMA'S PRE-BECK SENTENCING PROCEDURES ARE UNCONSTITUTIONAL CONFLICTS WITH THE DECISION OF THE ALABAMA SUPREME COURT ON THE SAME ISSUE

A. The Conflict

The fourth separate reason this case should be reviewed is that the court of appeals has decided a federal constitutional question in a way which squarely conflicts with the decision of the highest court of a state. In Ritter v. State, 429 So.2d 928, 933-37 (Ala. 1983), the Alabama Supreme Court upheld the constitutionality of the pre-Beck sentencing procedures in this very case. Its decision is the correct one.

B. The Merits of the Issue

While the statute involved is not a mandatory death penalty one, it did include a provision requiring every jury verdict form convicting a defendant of a capital offense to contain language "fix[ing] the punishment at death" (App. 204a), even though the actual sentencing decision was made later by the trial judge following a post-conviction sentence hearing (App. 209a - 211a). It was that provision which the court of appeals held rendered the statute unconstitutional.

In reaching an opposite conclusion, the Alabama Supreme Court explained that under state law "the trial court and not the jury is the sentencing authority," Ritter v. State, 429 So.2d at 936, and the purely formal language in every guilt stage verdict form "fixing" the penalty at death "is in no

way binding on the trial court in the latter's role as the sentencing authority," id., at 935. The Court further noted that the process included automatic two-tier appellate review, id., at 937, during which the aggravating and mitigating circumstances are independently weighed to ensure that death is the proper sentence. See pp. 17 and 19 of this petition, above.[11]

The court of appeals reasoning that the verdict form language is given weight in the trial judge's sentencing decision, and might in some cases be decisive, is flawed. As the court of appeals itself noted, that language "is simply a statutory consequence of the jury's finding of guilt of a capital offense, and reflects no consideration in

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[11]Alabama is apparently one of the very few states which provides automatic review of every death sentence case by both the intermediate appellate court and the state supreme court.

favor of imposing the death penalty in any particular case." (App. 36a) The implicit assumption is that the trial judges who actually applied the statute did not realize that. State trial court judges, who are at least as familiar with state law as federal appeals judges, are not as dense as the court of appeals assumes. Indeed, the district court specifically found that the trial judge in this case was not influenced in anyway by the verdict form language. (App. 156a - 158a) The death sentence was imposed because the trial court found the aggravating circumstances "far outweigh[ed]" the mitigating circumstances. (App. 157a)

C. The Relationship of this Issue to the Other Issues

It is not necessary for this Court to even consider the facial constitutionality

of the pre-Beck sentencing provisions in order to review this case. The holding that a habeas petitioner can be granted relief on a facial unconstitutionality claim even when the statute is constitutional as applied to him, see pp. 31 - 42, supra, can be addressed without reaching the merits of the facial claim itself. Likewise, the holding that Zant v. Stephens, supra, and Lockett v. Ohio, supra, absolutely forbid application of the harmless error rule to certain types of capital sentencing defects, see pp. 43 - 53, supra, can be reviewed without determining whether there actually was such a defect. See, e.g., Milton v. Wainwright, 407 U.S. 371, 372 (1972)(question of whether there was any constitutional error by-passed by holding that error, if any, was harmless).

It is true that the court of appeals holding concerning the cognizability of facial defects in habeas proceedings and its holding concerning the harmless error rule will have the greatest impact and cause the most mischief if not corrected. Nonetheless, the conflict between the Eleventh Circuit Court of Appeals and the Alabama Supreme Court on the facial constitutionality claim also merits review.

There are nine other pre-Beck death sentence cases pending at various stages of the appellate process.[12] The Alabama Supreme Court has held that while it is bound by decisions of this Court on federal constitutional issues, it is not bound by decisions

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[12]All but ten pre-Beck cases have been retried under procedures promulgated in Beck v. State, 396 So.2d 645, 662-64 (Ala. 1980) (on remand), the constitutionality of which are not involved here.

of any federal appeals court. E.g., Ballew v. State, 292 Ala. 460, 296 So.2d 206, 210 (1974), cert. denied, 419 U.S. 1130 (1975); Sanders v. State, 278 Ala. 453, 179 So. 2d 35, 45 (1965). Accordingly, the Alabama Supreme Court will continue to affirm death sentences in the other nine pre-Beck cases, the Eleventh Circuit will continue to set them aside, and the conflict and ensuing friction will continue. That conflict and friction can and should be ended by the only court whose decisions bind both those courts.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below summarily reversed. See, Wainwright v. Goode, 104 S.Ct. 378 (1983)(summarily reversing a court of appeals decision setting

aside a death sentence). In the alternative, the petition should be granted and the case set down for plenary review.

Respectfully submitted,

CHARLES A. GRADDICK
Attorney General

EDWARD E. CARNES*
Assistant Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

Counsel for Petitioners

*Counsel of Record

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRED SMITH, Commissioner, Alabama Department of Corrections; and W. E. JOHNSON, Warden, Holman Unit,

Petitioners

v.

WAYNE EUGENE RITTER,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Charles A. Graddick
Alabama Attorney General

Edward E. Carnes
Assistant Alabama
Attorney General

Counsel of Record

250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

Counsel for Petitioners

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-7486

WAYNE E. RITTER,

Petitioner-Appellant,

versus

FRED SMITH, Commissioner, Alabama Department of Corrections; and J. D. WHITE, Warden, Holman Unit,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

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(February 27, 1984)

Before JOHNSON and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

Petitioner Wayne Eugene Ritter was tried and convicted of capital murder on April 26, 1977, in the Mobile County, Alabama, Circuit Court. The trial court sentenced him to death. After exhausting his review by way of direct appeal in the Alabama state courts, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C.A. § 2254 in the United States District Court for the Southern District of Alabama. The district court denied all requested relief and dismissed the petition. Ritter v. Smith, 568 F.Supp. 1499 (S.D. Ala. 1983). This appeal followed.

Petitioner and John Lewis Evans, III, committed an armed robbery of a pawn shop in Mobile, Alabama, on January 5, 1977. During the course of this robbery, the pawn shop owner, Edward Nassar, was shot in the back by Evans and was killed. Petitioner and

Evans were apprehended by agents of the Federal Bureau of Investigation on March 7, 1977, in Little Rock, Arkansas. On March 8, 1977, after waiving his Miranda rights, petitioner confessed his involvement in the Mobile, Alabama, robbery and murder to the FBI agents.

Petitioner and Evans were indicted under Alabama's death penalty statute[1] for the capital offense of murder during the commission of a robbery.[2] Acting against the advice of his lawyer, petitioner entered a guilty plea to this charge and sought to forego a jury trial, but this procedure was not available under the Alabama death penalty statute then in force.[3] Petitioner

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[1]Footnote 1 and all other footnotes for this opinion are reproduced seriatim at the end of this opinion. See pp. 49a - 60a, infra.

waived his right to a separate trial and requested to be tried with his co-defendant, Evans. Despite his lawyer's advice to the contrary, petitioner testified against himself before both the grand jury and his trial jury. Petitioner testified before the grand jury and at trial that, although he did not fire the shot that killed Edward Nassar, he possessed the intent to kill; he stood ready and willing to assist in the killing; and he would have been the actual triggerman if Evans had not been in his line of fire. During his trial testimony, petitioner threatened to harm the jury if they did not convict him of the capital offense, and petitioner made a thumbs up gesture to the jury when the guilty verdict was announced.

Pursuant to the then applicable Alabama death penalty statute, the jury included in

its guilty verdict a sentence of death.[4] At a separate sentencing hearing, during which evidence of statutory aggravating and mitigating factors was presented, the trial judge sentenced petitioner and Evans to death.

Petitioner's conviction and sentence were subject to automatic review under the Alabama death penalty statute,[5] and his case was in the Alabama appellate courts or before the United States Supreme Court on petition for writ of certiorari to the Alabama Supreme Court for the next six years.[6] The United States Supreme Court granted certiorari on three occasions, but each resulted in a remand to the Alabama Supreme Court rather than a decision on the merits of petitioner's claim.[7] On the third remand, the Alabama Supreme Court affirmed petitioner's conviction and sentence, Ritter v. State,

429 So.2d 928 (Ala. 1983), and following the denial of a rehearing, set petitioner's execution for May 13, 1983.

On May 5, 1983, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C.A. § 2254 in the United States District Court for the Southern District of Alabama. Following an initial hearing on the petition, the district court entered an order staying petitioner's execution. In June of 1983 an evidentiary hearing was held and in August the district court entered an opinion and order denying all requested relief and dismissing the petition. Ritter v. Smith, 568 F. Supp. 1499 (S.D. Ala. 1983).

In this appeal, petitioner challenges the district court's denial of habeas corpus relief on two grounds: (1) petitioner claims that the 1975 Alabama death penalty

statute under which he was convicted and sentenced to death violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment; and (2) petitioner claims that the death penalty as applied in Alabama violates the Eighth Amendment's guarantee against cruel and unusual punishment.[8] For the following reasons, we affirm the district court's denial of habeas corpus relief, with the exception of its denial of habeas corpus relief on petitioner's claim that the 1975 Alabama death penalty statute's sentencing procedures are unconstitutional, which we reverse.

I. The Constitutionality of the 1975 Alabama Death Penalty Statute

Petitioner challenges both his conviction and his death sentence on the grounds of the constitutionality of the 1975 Alabama death penalty statute under which he was tried,

convicted and sentenced to death. Petitioner claims that he is entitled to a new trial because he was prejudiced by the 1975 Alabama death penalty statute's preclusion of the jury's consideration of lesser included offenses at the guilt/innocence phase of his trial.[9] Petitioner also claims that the statute's requirement that the sentencing authority, in Alabama the trial judge, consider the jury's mandatory death sentence in determining whether to impose the death sentence[10] renders his sentencing hearing constitutionally infirm. We affirm the district court's denial of habeas corpus relief on the first claim, and reverse on the second.

A. The Preclusion Clause: The Guilt/Innocence Phase of Petitioner's Trial

In Beck v. Alabama, 447 U.S. 625 (1980), the United States Supreme Court was

presented with a challenge to the preclusion clause of the 1975 Alabama death penalty statute and held that the statute's preclusion of the jury's consideration of a verdict of guilt on a lesser included noncapital offense, especially in light of the mandatory sentencing clause, unacceptably diminished the reliability of the factfinding process in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, when the evidence would have supported such a verdict.

In Hopper v. Evans, 456 U.S. 605 (1982), the United States Supreme Court addressed the issue of whether "[a]fter invalidation of a state law which precluded instructions on lesser included offenses in capital cases, a new trial is required in a capital case in which the defendant's own evidence negates the possibility that such an

instruction might have been warranted." Id. at 606. The Court held that "[d]ue process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." Id. at 611 (emphasis in original). Reviewing Evans' course of conduct at trial of actively seeking the death penalty, and thus his own testimony that he intended to kill his victim, the Court found that no evidence was present to warrant a lesser included offense instruction in Evans' case, and that "[Evans] suggests no plausible claim that he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial." Id. at 613. The Court therefore held that Evans was not prejudiced by the existence of the preclusion clause in the 1975 Alabama death penalty statute and was not entitled

to a new trial. The Court noted, however, that "[i]n another case with different facts, a defendant might make a plausible claim that he would have employed different trial tactics -- for example, that he would have introduced certain evidence or requested certain jury instructions -- but for the preclusion clause." Id. at 613-14 n.___.

Petitioner argues that this is the other case with different facts from that in Evans, and that he would have employed different trial tactics -- seeking a felony murder lesser included offense instruction and not making statements suggesting his intent to kill the victim -- but for the preclusion clause. Of course, petitioner's claim rests on the premise that his conduct at trial was based on his knowledge of the preclusion clause, and that armed with that

knowledge he chose to seek the death penalty at trial in preference to life imprisonment without parole. Petitioner concedes that the district court found as a fact that he had no knowledge of the preclusion clause at the time he embarked on his course of conduct of actively seeking the death penalty, but argues that the district court's fact-findings are clearly erroneous.[11]

The district court refused to credit petitioner's testimony at the evidentiary hearing that he would have pursued a different course of conduct during his trial and presented a lesser included offense defense in the absence of the preclusion clause, but instead credited the testimony of two FBI agents and a Mobile police officer that petitioner announced his intent to seek the death penalty before he learned of the existence of the preclusion clause.

Both FBI agents who interviewed petitioner in Little Rock, Arkansas, testified that petitioner told them that he preferred execution to spending the rest of his life in prison, and that he intended to seek execution when he returned to Alabama. The Mobile police officer who accompanied petitioner on his flight from Arkansas to Alabama testified that petitioner told him that he intended to plead guilty and to seek the death penalty on his return to Alabama. Petitioner testified at the evidentiary hearing that he wasn't sure at what point in time he became aware of the preclusion clause, but that "[i]t was after I got here to Alabama."[12]

Petitioner has not identified any evidence in the record in support of his claim that the district court's crediting of this testimony that the petitioner formulated his

strategy of actively seeking the death penalty before he returned to Alabama and before, as petitioner testified, he was aware of the preclusion clause was clear error. After a careful review of the record, we can find no evidence suggesting that the district court so erred. We therefore hold that under Evans petitioner has failed to show that he would have employed different trial tactics but for the preclusion clause, and that accordingly petitioner is not entitled to a new guilt/innocence phase trial.

B. The Mandatory Sentencing Clause: The Sentencing Phase of Petitioner's Trial

Petitioner claims that the 1975 Alabama death penalty statute's sentencing procedures, requiring consideration by the sentencing judge of the jury's mandatory death sentence, in effect at the time of his

conviction and sentence are unconstitutional and that he is entitled to a new sentencing hearing. The State does not address the merits of petitioner's constitutional challenge to the sentencing procedures. Instead, the State contends that all of the sentencing procedure claims here asserted by the petitioner were raised by his co-defendant, John Lewis Evans, III, and rejected on their merits by the United States Supreme Court in its decisions denying Evans a stay of execution pending the disposition of his petition for writ of certiorari, Evans v. Alabama, ___ U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d 921 (1983) (Powell, J. in chambers), and vacating a stay of execution entered by the United States District Court for the Southern District of Alabama, Alabama v. Evans, ___ U.S. ___, 103 S.Ct. 1736, 75 L.Ed.2d 806 (1983) (per curiam).

Alternately, the State contends that any constitutional error in petitioner's sentencing proceeding was harmless beyond a reasonable doubt.

For the following reasons, we hold that the 1975 Alabama death penalty statute's sentencing procedures, under which petitioner was sentenced to death, are unconstitutional and that petitioner is entitled to a new sentencing hearing.

1. The United States Supreme Court's Decisions in the Evans Case

The procedural history of Evans' challenges to the constitutionality of Alabama's capital sentencing procedures, necessary to provide the context for the decisions on which the State relies, is as follows.

Evans and petitioner were both sentenced to death under the 1975 Alabama death penalty statute.[13] In a joint appeal, pursuant

to the automatic appeal provision of the death penalty statute,[14] Evans and petitioner challenged the constitutionality of their sentencing proceedings. The Alabama Court of Criminal Appeals affirmed their convictions and sentences, Evans v. State, 361 So.2d 654 (1977), and the Alabama Supreme Court affirmed Evans' conviction and sentence, 361 So.2d 666 (1978).[15] Evans' petition for writ of certiorari to the Alabama Supreme Court was denied. Evans v. Alabama, 440 U.S. 930 (1979).

Evans then filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Alabama claiming, inter alia, that the death penalty statute's preclusion clause and sentencing procedures were unconstitutional. After an evidentiary hearing, the district court rejected Evans' claims on their merits and

denied the petition. Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979). Evans appealed, and the former Fifth Circuit reversed the district court on the grounds that the statute's preclusion clause was unconstitutional and that the harmless error rule did not apply. Evans v. Britton, 628 F.2d 400 (1980) (per curiam), modified on rehearing, 639 F.2d 221 (1981) (per curiam). The United States Supreme Court granted certiorari and reversed the judgment of the Court of Appeals on the preclusion clause issue. Hopper v. Evans, 456 U.S. 605 (1982).

The judgment of the United States Supreme Court reinstated Evans' conviction, but his challenges to the statute's sentencing procedures remained to be decided by the Court of Appeals on remand. In July of 1982, however, after briefing and before a decision,

Evans dismissed his attorneys and filed a motion with the Court of Appeals seeking leave to dismiss his appeal. This Court dismissed the appeal on October 19, 1982.

On October 22, 1982, the State filed a motion requesting that the Alabama Supreme Court set an execution date for Evans. Evans filed a petition in response attacking the constitutionality of the statute's sentencing procedures and requesting a new sentencing hearing. The Alabama Supreme Court denied Evans' petition, Evans v. State, 432 So.2d 463 (1983), and set Evans' execution for April 22, 1983.

On April 19, 1983, Evans filed a petition for certiorari in the United States Supreme Court. Later the same day, Evans filed an application for a stay of execution pending the disposition of his petition for certiorari. On April 21, 1983, Justice Powell,

acting in his capacity as Circuit Justice and with the concurrence of six other members of the Court, denied Evans' application for a stay, Evans v. Alabama, ___ U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d 921, stating that "[Evans'] constitutional challenges to Alabama's capital-sentencing procedures have been reviewed exhaustively and repetitively by several courts in both the state and federal systems," ___ U.S. at ___, 103 S.Ct. at ___, 75 L.Ed.2d at 923, and concluding that "[t]here is not 'a reasonable probability that four members of this Court would find that this case merits review.'" Id. (quoting White v. Florida, 458 U.S. ___, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982) (Powell, J. in chambers)).

Approximately seven hours before his scheduled execution, Evans filed a second habeas petition in the United States

District Court for the Southern District of Alabama again claiming, inter alia, that the statute's sentencing procedures were unconstitutional. The district court ordered a temporary stay of execution. The State sought an order from this Court vacating the stay, which was denied. The United States Supreme Court granted the State's application to vacate the district court's stay of execution. Alabama v. Evans, ___ U.S. ___, 103 S.Ct. 1736, 75 L.Ed.2d 806 (1983) (per curiam). Evans was executed on April 22, 1983.

The State concedes that the decision in Evans v. Alabama, denying Evans' application for a stay pending the disposition of his petition for certiorari, is not a binding decision on the merits of Evans' constitutional challenges to Alabama's sentencing procedures. We agree,[16] and hold that this

decision does not decide the merits of petitioner's claims before this Court.

The State claims, however, that the decision in Alabama v. Evans, granting the State's application to vacate the stay of execution, is such a determination on the merits of Evans' sentencing procedure claims and controls petitioner's present challenge to Alabama's capital sentencing procedures. We disagree.

The decision in Alabama v. Evans does not support the State's argument that it was intended as a binding decision on the merits of Evans' sentencing procedure claims. First, we note that the opinion in Alabama v. Evans was rendered as a ruling on an application to vacate a stay.[17] Second, we find no textual support in the opinion itself for the State's argument. The merits of Evans' sentencing proceeding claims were

not discussed by the Court in Alabama v. Evans. Instead, the Court quoted Justice Powell's statement in Evans v. Alabama, that Evans' "constitutional challenges to Alabama's capital-sentencing proceedings have been reviewed exhaustively and repetitively by several courts in both the state and federal systems," ___ U.S. at ___, 103 S.Ct. at ___, 75 L.Ed. 2d at 808, and noted that:

> [T]he District Court found that "counsel for petitioner conceded that all issues raised in the petition were raised in the petition previously filed before [the United States District Court] except for the issue asserted in section 12 of the petition." Thus, in the latest petition for habeas corpus, all but one of the grounds presented have been presented before and rejected.
> ___ U.S. at ___, 103 S.Ct. at ___, 75 L.Ed.2d at 808-809 (emphasis supplied).

The Court granted the State's application to vacate the stay on the grounds that:

> [Evans'] petition for writ of habeas corpus filed on April 21, 1983, thus

> seeks to litigate several issues conclusively resolved in prior proceedings and a claim never before raised. This new claim, challenging the validity of one of the aggravating circumstances found to exist in this case, is a question of law as to which no further hearing is required. ___ U.S. ___ at ___, 103 S.Ct. at ___, 75 L.Ed.2d at 809 (emphasis supplied).

The similarity between the Court's analysis of Evans' sentencing proceeding claims in Alabama v. Evans and Sanders v. United States, 373 U.S. 1 (1962), is apparent.[18] Under Sanders, an issue may be conclusively resolved for purposes of a successor habeas petition if it has been presented before and rejected on its merits, and the ends of justice would not be served by reaching the merits of the successor petition. Id. at 15. The petitioner's failure to appeal an adverse ruling on his prior habeas petition is a factor considered in the ends of justice calculus of the Sanders test. Johnson

v. Wainwright, 702 F.2d 909 (11th Cir. 1983); Bass v. Wainwright, 675 F.2d 1204 (11th Cir. 1982). A court's refusal to entertain an issue raised in a state prisoner's successor habeas petition on the ground that the issue has been conclusively resolved because it has previously been presented, decided on its merits, rejected, and on appeal from that rejection voluntarily dismissed, is clearly not a decision on the merits.[19] Sanders v. United States, 373 U.S. at 18.

In addition to the procedural posture of Alabama v. Evans as a decision on an application to vacate a stay, the lack of discussion of Evans' sentencing procedure claims, and the similarity between the Court's analysis of Evans' sentencing procedure claims and principles governing successor habeas petitions, we find further evidence that the

decision was not intended as one on the merits of Evans' sentencing procedure claims in Justice Marshall's dissent: "The execution of Evans prior to a decision of his claims on the merits will ensure that such certainty [of the legality of Evans' execution] is never achieved." ___ U.S. at ___, 103 S.Ct. at ___, 75 L.Ed.2d at 812 (emphasis supplied).

In sum, we find no evidence in Alabama v. Evans to support the State's claim that the United States Supreme Court reached the merits of Evans' sentencing procedure claims and determined that the Alabama capital sentencing procedures were constitutional. Therefore, since petitioner, unlike Evans,[20] appeals from the denial of his first habeas corpus petition, we hold that the decision in Alabama v. Evans does not preclude our consideration of the merits of his challenge

to the 1975 Alabama death penalty statute's sentencing procedures.

2. The 1975 Alabama Death Penalty Statute's Sentencing Procedures

The Alabama death penalty statute provides that if the jury finds the defendant guilty of a capital offense "[i]t shall fix the punishment at death." Ala. Code § 13-11-2(a) (1975) (repealed 1981). The jury has no discretion to fix any other penalty. The jury is not informed that the judge is the final sentencing authority and is thus led to believe, by implication, that its sentence will be final. Beck v. Alabama, 447 U.S. 625, 639 n.15 (1980).

If the defendant is convicted of a capital offense, and the death sentence thus automatically imposed by the jury, the statute provides that the trial judge must then hold a separate sentencing hearing at which

evidence "[m]ay be presented as to any matters that the court deems relevant to sentence and shall include any matters relating to any of the [statutory] aggravating or mitigating circumstances." § 13-11-3. The judge then determines whether to sentence the defendant to death or to life imprisonment without parole. § 13-11-4. "[A]fter weighing the aggravating and mitigating circumstances, [the court] may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole." Id. Or "[t]he court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death." Id. If the court imposes the death sentence, it must set forth in writing the factual findings from the trial and the sentencing

hearing, including aggravating and mitigating circumstances, that form the basis for its sentence. Id. The judgment of conviction and sentence of death are subject to automatic appeal. § 13-11-5.

For clarity of analysis, we repeat that under this statutory scheme the trial judge is the final sentencing authority and that the jury's mandatory death sentence is not statutorily binding on the judge. For this reason, the district court termed the jury's mandatory sentence the "phantom" sentence. Petitioner contends, however, that the statute's express requirement that the judge weigh the factor of the phantom sentence -- a factor petitioner claims is facially unconstitutional because it is unguided and standardless, reflects a blurred consideration of guilt and sentencing concerns, and does not reflect an individualized

consideration of the particular defendant -- in determining whether or not to impose the death sentence renders the sentencing procedure constitutionally infirm.[21] Accordingly, petitioner claims that he is entitled to a new sentencing hearing.[22] We agree.

In Furman v. Georgia, 408 U.S. 238 (1972), the Court concluded that capital punishment, as then administered under capital sentencing procedures vesting unguided sentencing discretion in the ultimate sentencing authority, had become constitutionally cruel and unusual punishment. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, ___ U.S. ___, 51

U.S.L.W. 4891, 4894 (U.S. June 22, 1983) (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Steven, JJ.)).

> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. ...It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (citations and footnotes omitted).

And because there is "[a] qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" Zant v. Stephens, 51 U.S.L.W. at 4897 (quoting Woodson v. North Carolina, 428

U.S. 280, 305 (1976)). Thus, the Court's decisions since Furman have "[m]ade clear that the States may impose this ultimate sentence only if they follow procedures designed to assure reliability in sentencing determinations." Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134, 1139 (1983) (Stevens, Powell, JJ. concurring). In assessing capital sentencing procedures the Court has "[a]ttempted to provide standards for a constitutional death penalty that would serve both goals of a measured, consistent application and fairness to the accused." Eddings v. Oklahoma, 455 U.S. 104, 111 (1982).

Due to this heightened standard of reliability in capital sentencing procedures, involving considerations of both consistency and fairness to the accused, capital sentencing procedures must be tailored to provide for "[a]n individualized determination

on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 51 U.S.L.W. at 4895 (emphasis in original). Thus, sentencing schemes that exclude from the sentencer's consideration the critically relevant factors of the character of the individual defendant and the circumstances of the crime as mitigating factors are constitutionally inadequate. Lockett v. Ohio, 438 U.S. 586 (1978).

Likewise, particular features included in a sentencing scheme may be"[s]ufficiently inadequate, unreliable, or unfair that they violate the United States Constitution." Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d at 1150 (Stevens, Powell, JJ. concurring). Each aggravating factor included in a sentencing scheme "[m]ust satisfy a constitutional standard derived from the principles

of Furman itself." Zant v. Stephens, 51 U.S.L.W. at 4894-95. Therefore, an aggravating factor, whether statutory or non-statutory, considered by the sentencer in its determination of whether to impose the death sentence must not be "[c]onstitutionally impermissible or totally irrelevant to the sentencing process." Id. at 4897.

In light of these principles, and mindful of the Court's admonition that "[a]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error," id., we turn to an examination of the factor of the jury's mandatory death sentence included in Alabama's capital sentencing determination.

First, the jury's mandatory death sentence is a factor in the sentencing process which must meet the constitutional standards established in Furman to be permissible.[23] This is a test the mandatory death sentence factor clearly does not meet. A mandatory death sentence requirement, withdrawing all sentencing discretion from the jury, results in a distortion of the guilt/innocence determination in order to allow for such discretion. Woodson v. North Carolina, 428 U.S. 280 (1976). The jury's decision to exercise this de facto sentencing discretion is both unguided and standardless, and necessarily reflects a blurred consideration of guilt/innocence and sentencing concerns. A mandatory death penalty statute therefore "[d]oes not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to

guide, regularize and make rationally reviewable the process for imposing a sentence of death." Id. at 303. Further, the jury's mandatory death sentence by definition does not reflect any individualized focus on the circumstances of the particular offense and the character and propensities of the offender. Roberts v. Louisiana, 428 U.S. 325 (1976). Fundamentally, the mandatory death sentence is a factor which is totally irrelevant to the sentencing process; it is simply a statutory consequence of the jury's finding of guilt of a capital offense, and reflects no considerations in favor of imposing the death penalty in any particular case. Cf. Beck v. Alabama, 447 U.S. 625, 642 (1980) ("In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process..."). Because the

mandatory death sentence as a statutorily required factor to be considered in the sentencing process is a factor which is unguided and standardless, reflects no individualized consideration of the particular defendant or crime, and is irrelevant to the sentencing process, we hold that it is a constitutionally impermissible factor in Alabama's capital sentencing scheme.

We further find that the constitutionally impermissible factor of the jury's mandatory death sentence infects the trial judge's sentencing determination. Although a separate sentencing hearing is held by the trial judge, at which evidence of aggravating and mitigating factors is introduced, the statute requires that in making the determination whether to impose the death sentence after reviewing this evidence the judge must decide whether he will "[r]efuse to accept

the death penalty as fixed by the jury." Ala. Code § 13-11-4 (1975) (repealed 1981). Moreover, the statute requires the judge to weigh the mandatory death sentence factor in the balance with his consideration of aggravating and mitigating circumstances in deciding to impose the death penalty. Id. Thus, the constitutionally impermissible factor of the jury's mandatory death sentence must be given weight in the judge's own sentencing decision. In Beck the Supreme Court noted the influence of this factor on the judge's sentencing decision:

> [I]t is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to statistics submitted by the State's Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate sentencing hearing in aggravation and mitigation before he imposes sentence.
> 447 U.S. at 645 (footnote omitted).

In order to arrive at a sentencing determination unaffected by the influence of the jury's mandatory death sentence, the judge must disobey the statute's express requirement that the mandatory death sentence be considered in his decision.[24]

We hold that the inclusion of the constitutionally invalid factor of the jury's mandatory death sentence in the sentencing determination, and the statutorily required influence of that invalid factor on the judge's sentencing decision, renders the 1975 Alabama death penalty statute's sentencing procedures facially unconstitutional.

3. The Harmless Error Rule

The State contends that any constitutional defect in the sentencing procedures was, in petitioner's case, harmless error beyond a reasonable doubt because in the

unique circumstances here presented, in which petitioner testified against himself at trial and threatened the jury with harm if they did not convict him and sentence him to death, a reasonable sentencer under any set of procedures would have imposed the death penalty. Petitioner counters by claiming that the harmless error rule does not apply to facial constitutional defects in a capital sentencing scheme; relying on Stewart v. Massachusetts, 408 U.S. 845 (1972) (per curiam), Woodson v. North Carolina, 428 U.S. 280 (1976), Roberts v. Louisiana, 428 U.S. 325 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978), in which the Supreme Court invalidated death sentences imposed under unconstitutional sentencing procedures without discussion or application of the harmless error rule. In response, the State cites Hopper v. Evans, 456 U.S. 605

(1982); Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891 (U.S. Jan. 22, 1983); and Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc),[25] as examples of the application of the harmless error rule in capital cases. We find that Hopper and Washington are distinguishable from the present case,[26] and that the analysis in Stephens governs our disposition of this issue.

In Stephens, the Supreme Court employed essentially a federal harmless error analysis, Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134, 1144-45, n. 8 (1983), to a constitutional defect in a capital sentencing scheme. One of the three statutory aggravating factors found by Stephens' sentencing jury was subsequently held invalid by the Georgia Supreme Court as unconstitutionally vague because it failed

to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed. The Court addressed the issue of whether, under these circumstances, a defendant's death sentence must be vacated, and found that "[t]he answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid." 51 U.S.L.W. at 4891. The Court first found that under Georgia's capital sentencing scheme the finding of an aggravating factor served the function of narrowing the class of persons convicted of murder who are eligible for the death penalty, that the two valid statutory aggravating factors properly

achieved this function, and that the discretion of the sentencer was thus suitably directed and limited in this case. The Court then considered whether the invalid factor injected a constitutionally impermissible consideration into the sentencer's exercise of that limited discretion:

> Respondent contends that the death sentence was impaired because the judge instructed the jury with regard to an invalid statutory aggravating circumstance, a "substantial history of serious assaultive criminal convictions," for these instructions may have affected the jury's deliberations. In analyzing this contention it is essential to keep in mind the sense in which that aggravating circumstance is "invalid." It is not invalid because it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected. Georgia has not, for example, sought to characterize the display of a red flag, cf. Stromberg v. California, the expression of unpopular political views, cf. Terminiello v. Chicago, 337 U.S. 1 (1949), or the request for trial by jury, cf. United States v. Jackson, 390 U.S. 570 (1968), as an aggravating circumstance. Nor has Georgia attached the "aggravating" label to factors that are constitutionally

> impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, cf. Herndon v. Georgia, 301 U.S. 242 (1937), or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. Miller v. Florida, 373 So.2d 882, 885-886 (Fla. 1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process would require that the jury's decision to impose death be set aside. 51 U.S.L.W. at 4897 (emphasis supplied).

In Stephens, the Court held that the underlying evidence introduced by the invalid factor was properly admissible at the sentencing hearing under both Georgia law and the United States Constitution, that "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination," id. at 4898, and that any impact on the jury's deliberations from the fact that this

evidence was improperly designated a statutory aggravating factor "[c]annot fairly be regarded as a constitutional defect in the sentencing process." Id. Accordingly, Stephens' death sentence was upheld.

The import of Stephens is clear: a federal harmless error analysis[27] will be applied to a facial constitutional defect in a capital sentencing scheme if, and only if, two criteria are met. First, independent of the invalid factor, the sentencing scheme must limit and channel the sentencer's discretion. Second, the invalid factor must not inject constitutionally impermissible or totally irrelevant considerations into the sentencer's exercise of that discretion. In Stephens, both of these criteria were met, and the defendant's death sentence was therefore constitutionally imposed. In Lockett v. Ohio, 438 U.S. 586 (1978), Ohio's

death penalty statute narrowly limited the sentencer's discretion to consider only statutory mitigating factors, which did not include a consideration of the circumstances of the crime and the record and character of the offender as mitigating factors. The first criterion of the Stephens test was thus met in Lockett, and the sentencer's discretion was limited and channelled. The second criterion, however, was not met by a scheme that excluded the constitutionally relevant and indispensable consideration by the sentencer of any aspect of the defendant's character and record as an independently mitigating factor. In Lockett, the defendant's death sentence was vacated without further inquiry.

In the present case, we assume without deciding that, absent the invalid factor of the jury's mandatory death sentence, the

1975 Alabama death penalty statute's statutory aggravating and mitigating factors suitably limit the sentencer's discretion. We hold, however, that this invalid factor injects a constitutionally impermissible and irrelevant consideration into the sentencer's exercise of that discretion in determining whether to impose a sentence of death. Therefore, as in Lockett, no further inquiry is required, and petitioner's death sentence is due to be vacated.

II. The Application of the Death Penalty in Alabama

Petitioner claims that the death penalty as applied in Alabama violates the Eighth Amendment's guarantee against cruel and unusual punishment. For the reasons stated in the district court's opinion, 568 F. Supp. at 1525-1527, we reject this claim.

III. Conclusion

The decision of the district court that petitioner is not entitled to a new sentencing hearing is REVERSED, and this case is REMANDED with instructions to the district court to issue the writ of habeas corpus if the State of Alabama does not afford petitioner a new sentencing hearing.

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

[Footnotes begin on next page.]

[1] Ala. Code §§ 13-11-1 - 13-11-9 (1975) (repealed 1981).

[2] Id. § 13-11-2(a)(2) provides that "robbery or attempts thereof when the victim is intentionally killed by the defendant" is a capital offense."

[3] See Prothro v. State, 370 So.2d 740 (Ala. Cr.App. 1979).

[4] Id. § 13-11-2(a).

[5] Id. § 13-11-5.

[6] For a detailed procedural history of this case see Ritter v. State, 429 So.2d 928, 931-32 (Ala. 1983).

[7] Ritter v. Alabama, 448 U.S. 903 (1980); Alabama v. Ritter, 454 U.S. 885 (1981); Alabama v. Ritter, 457 U.S. 1114 (1982).

[8] Petitioner also claims that the failure of the Alabama courts to conduct comparative proportionality review under the 1975 death penalty statute violates the Eighth Amendment. This claim is foreclosed by the Supreme Court's recent decision in Pulley v. Harris, ___ U.S. ___, 52 U.S.L.W. 4141 (U.S. Jan. 23, 1984), in which the Court held that comparative proportionality review is not constitutionally required.

[9] Ala. Code § 13-11-2(a) (1975) (repealed 1981) contains, respectively, both the mandatory sentencing clause and the preclusion clause at issue in this appeal:

If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses.

[10] Id. § 13-11-4 provides that:

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death.

If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in

section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances.

[11] See Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982), holding that the clearly erroneous rule applies to the district court's findings of fact in capital cases.

[12] Record at 252.

[13] Evans and petitioner were tried together, were both convicted of the capital offense, and were sentenced to death by the same judge at a joint sentencing proceeding.

[14] Ala. Code § 13-11-5 (1975) (repealed 1981).

[15] The Alabama Supreme Court reversed petitioner's conviction and sentence and remanded to the Alabama Court of Criminal Appeals on the nontriggerman issue. Evans v. State, supra.

[16] An application for a stay pending the disposition of a petition for certiorari will be granted when there is "[a] reasonable possibility that four members of the Court will find that this case

merits review." Evans v. Alabama, ___ U.S. at ___, 103 S.Ct. at ___, 75 L.Ed.2d at 923 (quoting White v. Florida, 458 U.S. ___, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982) (Powell, J. in chambers)); see also Lenhard v. Wolff, 443 U.S. 1306 (1969) (Rehnquist, J. in chambers). A denial of a stay pending disposition of a petition for certiorari on the ground that four members of the Court would deny certiorari, as in Evans v. Alabama, certainly imports no more than a decision to deny certiorari, which does not express any views on the merits of the claims presented. Alabama v. Evans, ___ U.S. at ___, 103 S.Ct. at ___, 75 L.Ed.2d at 811 n. _ (Marshall, J. dissenting); see also Grave v. Barnes, 405 U.S. 1201, 1204 (1972) (Powell, J. in chambers).

17 "[T]he well established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay." Named and Unnamed Children v. Texas, 448 U.S. 1327, 1330 (1980) (Powell, J. in chambers). We have previously noted, see note 16 supra, that a decision to grant or deny a stay is not one on the merits of the claims presented.

18 The State contends that the Court's analysis in Alabama v. Evans cannot be interpreted in light of the Sanders principles for three reasons. First, the State argues that such an interpretation is unwarranted because the Court in

Alabama v. Evans did not explicitly refer to Sanders, Rule 9(b) Governing 28 U.S.C.A. § 2254 Cases, or abuse of the writ principles. We find this argument unconvincing in light of the similarity of analysis between the Court's treatment of Evans' sentencing procedure claims and Sanders. See text supra.

Second, the State claims that the Court's treatment of the one new claim raised in Evans' successor habeas petition, that the Alabama courts applied a statutory aggravating factor in an unconstitutionally broad manner, refutes such an interpretation. In addressing this issue, the Court noted that it had not been raised in any of Evans' previous state and federal proceedings, and had been raised for the first time approximately seven hours before his execution. "His only justification for raising this issue now is that, in his view, the decision in Proffitt v. Wainwright, 685 F.2d 1227, 1265-66 (CA11), decided in September, 1982, some seven months ago, has changed the applicable law." ___ U.S. at ___, 103 S.Ct. at , 75 L.Ed.2d at 809. Finding that Proffitt did not change the applicable law, and that there was no constitutional violation in finding the aggravating factor in Evans' case, the Court held that the new claim was without merit and "[i]s a question of law as to which no further hearing is required." Id. We note that this analysis parallels that required under Sanders: a court may refuse to hold an evidentiary

hearing and decline to entertain a successor habeas petition raising a new ground not previously presented unless the petitioner can show that the delay in asserting the new ground is not an abuse of the writ -- a burden that may be met by showing an intervening change in the applicable law. See also Alabama v. Evans, ___ U.S. ___, 103 S.Ct. ___, 75 L.Ed.2d at 811 (Marshall, J. dissenting). The fact that the Court reached the merits of Evans' new claim and determined that on the facts of his case there was no violation of the Godfrey v. Georgia, 446 U.S. 420 (1980), principle that aggravating factors must be construed and applied in a nonarbitrary manner does not indicate, as the State claims, that the San- ders principles were not applied by the Court in Alabama v. Evans or that the Court so reached the merits of Evans' sentencing procedure claims.

Third and finally, the State points to Autry v. Estelle, 52 U.S.L.W. 3293 (U.S. Oct. 5, 1983) (White, J. in chambers), as evidence that it claims supports an argument that the Supreme Court does not apply the Sanders principles in capital cases. Again, the opinion in Autry refutes such a claim. In Autry, Justice White entered a stay of execution based on a claim raised for the first time in a second habeas petition that Texas' failure to provide comparative proportionality review was unconstitutional. In that case, Justice White concluded that a change in the applicable law, the Court's

grant of certiorari in Pulley v. Harris, ___ U.S. ___ 52 U.S.L.W. 4141 (U.S. Jan. 23, 1984), made the issue in the second habeas petition one that did not lack substance.

19 The State argues that "conclusively resolved" as used by the Court in Alabama v. Evans means a determination on the merits of Evans' sentencing procedure claims. We agree that a conclusive resolution for purposes of the Sanders analysis is one on the merits. We find, however, that the conclusion that the State seeks to draw from this unexceptionable premise, that the Court in Alabama v. Evans decided this issue on its merits, does not follow and is in fact contradicted by the opinion itself: "conclusively resolved in prior proceedings" -- the decision disposing of the first habeas petition and the dismissal of Evans' appeal from this decision.

20 The State contends that a ruling by this Court in petitioner's favor on his sentencing procedure claims leads to the inevitable result that in Alabama v. Evans the Supreme Court vacated the stay of execution of a defendant convicted of the same crime and sentenced by the same judge under the same statute as petitioner. We find the procedural distinction between Evans' and petitioner's cases critical. Evans was given the full and fair opportunity to present his constitutional challenges to Alabama's capital sentencing procedures in both state

and federal court; after an evidentiary hearing, the district court rejected his claims on their merits; Evans chose to dismiss his appeal from that decision. Petitioner, however, appeals from the district court's denial of his first challenge in federal court to the 1975 Alabama death penalty statute's sentencing procedures.

21 Petitioner also attacks the mandatory sentencing provision on the grounds that: (1) requiring the jury to fix the punishment at death whenever they find the defendant guilty of a capital offense, especially in light of the fact that the jury is not told that the judge is the final sentencing authority, blurs the separate questions of guilt and sentence and thus distorts the jury's role in the sentencing process, and (2) the mandatory sentence provision destroys the only mechanism by which evolving community standards may inform the sentencing decision in a capital case. Because the trial judge is the final sentencing authority under the statute, we read these claims as based on a premise that jury sentencing, or jury input into the sentencing determination, is constitutionally required. In Proffitt v. Florida, 428 U.S. 242, 252 (1976), the Supreme Court held that although jury sentencing can perform an important societal function, it is not constitutionally required. Therefore, we reject a challenge to the sentencing procedures on this ground.

22 A successful challenge to the mandatory sentencing provision as a factor in the judge's sentencing determination does not entitle petitioner to a new guilt/innocence phase trial, and petitioner does not so contend. The distortion in the guilt/innocence determination by the interaction of the preclusion clause and the mandatory sentencing clause, eliminating from the jury's consideration the third option of conviction on a lesser included offense, condemned by the Court in Beck was limited in Hopper to cases where the evidence warranted a lesser included offense instruction.

23 For purposes of this analysis, we treat the mandatory sentencing factor as analogous to an aggravating factor --weighing in favor of the imposition of the death sentence.

24 The district court noted that petitioner's claim that the influence of the jury's mandatory death sentence on the judge's decision to impose the death penalty rendered the sentencing process unconstitutional was substantial. 568 F.Supp. at 1521. The district court further noted that where the sentencing decision presented a close question the inclusion of the jury's mandatory death sentence in the sentencing formula might prejudice a defendant. The district court held, however, that in petitioner's case the trial judge acted without the influence of the mandatory sentence factor and accepted the jury's sentence

upon an independent weighing of aggravating and mitigating circumstances that did not include the factor of the mandatory death sentence. Id. We note that in order to arrive at this result, and ignore the mandatory sentence factor in his determination, the trial judge was presumed to have disregarded the Alabama statute. Further, because the petitioner challenges the statute on its face, and not as applied to him, the influence of the constitutionally impermissible factor of the jury's mandatory death sentence on the judge's sentencing determination in a close case requires a finding of facial unconstitutionality.

25 Decisions rendered by the en banc court of the former Fifth Circuit handed down after September 30, 1981, are binding on this Court unless and until overruled or modified by this Court en banc. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1981) (en banc).

26 Evans held that the harmless error rule applies to facial constitutional defects in a statute affecting the guilt/innocence phase of a capital trial, but did not address the applicability of such a rule to the sentencing phase. The State claims that the Beck Court's statement that the "death is different" principle, demanding greater reliability in capital sentencing procedures, "[m]ust apply to rules that diminish the reliability of the guilt determination," 447 U.S. at 638, requires that application of the harmless error rule to facial

constitutional defects at the guilt/innocence phase in Evans automatically entails a similar incorporation of the harmless error rule at the sentencing phase. We disagree. First, the Beck Court's statement was aimed at procedures diminishing the reliability of either the guilt/innocence or sentencing determination, and not the harmless error rule. Second, California v. Ramos, ___ U.S. ___ 77 L.Ed.2d 1171, 1185 (1983), noted the "[f]undamental difference between the nature of the guilt/innocence determination at issue in Beck and the nature of the life/death choice at the penalty phase," in addressing a defendant's challenge to the California death statute's sentencing procedures. Finally, because we hold that Stephens requires that the harmless error rule apply to some, but not all, defects in a capital sentencing scheme, we reject the State's argument that Beck and Evans speak to all sentencing procedure errors.

Washington held that the harmless error rule applies to ineffective assistance of counsel claims at the sentencing phase. No challenge to the constitutionality of the statutory sentencing scheme was involved.

27 The Supreme Court has not since Stephens addressed a case in which a factor in a capital sentencing was found invalid on federal constitutional grounds. See Wainwright v. Goode, 52 U.S.L.W. 3419 (U.S. Nov. 28, 1983) (nonstatutory aggravating factor improper under state

law); Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134 (1983) (same). In both of these cases the Court held that the error of state law did not rise to the level of a constitutional violation, and "[t]hus we need not apply the type of federal harmless error analysis that was necessary in [Stephens]." Barclay v. Florida, 77 L.Ed.2d at 1144-45 n. 8. In such a case, as the State points out, an analysis of the state law error as harmless error has been permitted. See id. at 1147-49; Shriner v. Wainwright, 715 F.2d 1452, 1458-59 (11th Cir. 1983); Moore v. Balkcom, 716 F.2d 1511, 1524 (11th Cir. 1983); Ford v. Strickland, 696 F.2d 804, 815 (11th Cir. 1983) (en banc) & Godbold, Chief J. concurring, 696 F.2d at 822-24. Of course, the error claimed in this case is a facial constitutional defect in the statute, and not a mere error in state law. Therefore, the Stephens test for the applicability of the federal harmless error rule governs and distinguishes the present case from the cases on which the State relies.

APPENDIX B

Wayne E. RITTER, Petitioner,

v.

Fred SMITH, Commissioner, Alabama Department of Corrections, and J.D. White, Warden, Holman Unit, Respondents.

Civ. A. No. 83-0457-H.

United States District Court,
S.D. Alabama, S.D.

Aug. 11, 1983.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

HAND, Chief Judge.

I. INTRODUCTION

This cause came before the Court pursuant to Wayne Eugene Ritter's petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. Petitioner was tried and convicted of capital murder and sentenced to death in 1977 in an Alabama state court.

Petitioner and John Lewis Evans committed an armed robbery of a pawn shop in Mobile, Alabama on January 5, 1977. During the course of the robbery, the pawn shop proprietor, Mr. Edward Nassar, was shot in the back by Evans and died. Petitioner and Evans were indicted under Alabama's capital murder statute. Each expressed a desire to plead guilty and forego a jury trial but that procedure was not permissible under the death penalty statute then in force. See Prothro v. State, 370 So.2d 740 (Ala.Cr.App. 1979). Petitioner and Evans gave inculpatory statements to the Grand Jury and each testified at trial admitting the necessary elements of the capital murder indictment and demanded the death penalty. The jury returned a verdict of guilty and, pursuant to the dictates of the death penalty statute, included in its verdict a sentence of

death. Following the verdict, additional evidence was presented to the trial judge regarding the aggravating and mitigating factors set out in Code of Alabama, 1975, Section 13-11-6 and 7, following which the trial judge sentenced petitioner and Evans to death. The conviction and death sentence were subject to automatic review under Code of Alabama, 1975, Section 13-11-5, and petitioner's case was in the Alabama appellate courts or before the Supreme Court of the United States for six years. Certiorari was granted by the United States Supreme Court on three occasions, but each resulted in a remand rather than any decision on the merits.

This petition involves the first presentation of petitioner's claims to the Federal Courts under 28 U.S.C. § 2254. The petition was filed on May 5, 1983 alleging

ten separate claims for habeas corpus relief. At that time petitioner was scheduled to be executed on May 13, 1983. Following an initial hearing on the petition, the Court determined it had jurisdiction[1] and that at least one of the ten alleged constitutional deprivations alleged in Mr. Ritter's petition raised substantial federal questions, and accordingly issued an order staying execution. The second evidentiary hearing was conducted on June 1 and 2, 1983, following discovery. The parties have filed briefs and proposed findings of fact and conclusions of law.

As noted above the petition advances ten separately identified claims. By order

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[1]Footnote 1 and all other footnotes for this opinion are reproduced seriatim at the end of this opinion. See pp. 186a - 192a, infra.

dated May 11, 1983, this Court directed petitioner to amend his petition and to present in this action any additional claims which he believed provided a basis for relief from his conviction or sentence. No amendment was filed. The Court therefore considers the ten grounds advanced in petitioner's original petition as the only basis upon which habeas corpus relief is available to the petitioner, and that any additional grounds have been waived. Habeas Rule 9(b). The Court will address each of these ten claims in this opinion.

For the reasons discussed more fully in the body of this decision, the Court concludes that there is no basis for the claimed relief and the petition will be dismissed with prejudice. The Court will also order that the stay entered May 6, 1983 be dissolved.

II. FINDINGS OF FACT

Based upon all of the records, files, exhibits, and testimony herein, this Court finds the following facts:

A. Electrocution as Cruel and Unusual Punishment

1. At the two day habeas hearing the Court took testimony on essentially three of the ten issues. The first dealt with whether capital punishment as practiced by the State of Alabama violated the Eighth Amendment's Cruel and Unusual Punishment Clause. That claim was dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for reasons stated on the record. The second and third issues related to the Alabama "preclusion clause". (See discussion infra). In particular testimony was taken on: 1) whether the "preclusion clause" was a factor in the petitioner's adoption of a

trial strategy to intentionally seek the death penalty; and 2) whether despite petitioner's trial strategy he was entitled to a jury instruction on the lesser included offense of felony murder.

B. Preclusion Clause—Trial Strategy

2. Petitioner was tried and convicted under the 1975 Alabama capital punishment law which defined some fourteen crimes for which the death penalty might be imposed and which also provided that an indictment and trial for one of those fourteen offenses "shall not include any lesser offenses ...." Code of Alabama, 1975, Section 13-11-3. The clause was later found to be unconstitutional in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). That decision was later modified in Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982) which provides that the

entitlement of the lesser included offense instruction is warranted only in those cases in which the evidence reasonably could support a verdict on the lesser included offense.

3. Petitioner claims that the "preclusion clause" has prejudiced him in two ways. First, he claims that his trial and pretrial tactics of confessing to the crime, cooperating with the prosecution, and attempting to coerce the jury into a guilty verdict were all motivated in part by his knowledge of the preclusion clause. Second, petitioner contends that without regard to the impact of the preclusion clause on petitioner's trial tactics, he was entitled under Beck, supra, and other applicable state and federal law to a charge on the lesser included non-capital felony murder offense.

4. At the habeas hearing on June 2, 1983, petitioner testified that he and his co-defendant, John Lewis Evans, entered a pawn shop in Mobile, Alabama on January 5, 1977, for the purpose of robbing the proprietor and obtaining a different handgun for the petitioner. During the course of the robbery, the proprietor, Mr. Edward Nassar, was shot and fatally wounded by Evans. This was one of a series of crimes committed by Evans and the petitioner between December 25, 1976 and March 7, 1977. In all, the pair committed some three dozen violent crimes during this crime spree including armed robbery, kidnapping, extortion and murder.

5. Petitioner testified at his trial that during the two-and-a-half month long multi-state crime spree, petitioner knew that sooner or later law enforcement

officers would catch up with him and Evans. (Exhibit 1, 343) In his own words, "we didn't intend to be taken alive when it did happen ... mainly because we didn't want to spend all that time in prison." Id. Accordingly, petitioner and his co-defendant Evans entered into a pact in which they agreed to shoot it out with law enforcement officers and be killed rather than be captured alive. (Exhibit 1, 330-331, 343-344) On cross-examination at the habeas hearing, petitioner admitted that his above-described testimony in his state court trial was true.

6. On March 7, 1977, petitioner and Evans were captured separately in Little Rock, Arkansas by FBI agents. (Testimony of Agents Bill Hardin and Jack Juel at the evidentiary hearing; Exhibit 1, 344).

7. The only reason petitioner was captured alive was the circumstances under which the FBI agents surprised and captured him. (Exhibit 1, 344) Upon being captured, petitioner expressed disappointment that he had been captured alive, and, indeed, made a statement to one of the FBI agents which was to the effect of: Why hadn't they shot him, because it would have saved everyone a lot of trouble. (Testimony at the evidentiary hearing)

8. On March 8, 1977, in Little Rock, Arkansas, after being repeatedly advised of his Miranda rights and freely waiving them, petitioner freely and voluntarily confessed to FBI agents his guilt for the many violent felonies he and Evans had committed in the above-described crime spree. (Exhibit 1, 293-312; testimony of agents Hardin and Juel at the evidentiary hearing).

9. On March 8, 1977, in Little Rock, Arkansas, petitioner stated to FBI agents who were interviewing him that he preferred execution to spending the rest of his life in prison, and he indicated at that time that he intended to seek execution when he returned to Alabama. Agent Hardin testified that Mr. Ritter told him that he (Ritter) had led a good life and had done more in a short period of time than most people do in their entire lives. Agent Hardin also stated that he personally had at that time no knowledge of the preclusion clause. Agent Juel testified that both Ritter and Evans indicated a preference for death over life imprisonment. Agent Juel further testified that this statement had not been included in their reports because the arrestees' philosophy was not relevant to a report on crimes committed. Nevertheless,

he was certain they made the "death preference" statement because he had never heard such a statement in his then previous thirteen years of service. (Testimony of Agents Hardin and Juel at the evidentiary hearing). The Court finds that at the time petitioner made those statements and expressed that intent, he had no knowledge of the procedural aspects of Alabama's capital punishment statute, the preclusion clause, or the sentence alternatives available under the statute. (Testimony of Agents Hardin and Juel at the evidentiary hearing; testimony of Ritter at the evidentiary hearing).[2]

10. Sometime after March 8, 1977, and on or before March 11, 1977, petitioner waived extradition and was flown from Little Rock, Arkansas to Mobile, Alabama. (Testimony of Captain Sam McLarity at the evidentiary hearing.) After being advised of his

Miranda rights and freely and voluntarily waiving them, petitioner made several oral statements to the Mobile police officers who accompanied him on the flight back to Alabama. (Testimony of Captain McLarity at the evidentiary hearing). On that flight John Evans in the presence of petitioner asked Captain McLarity if Alabama had a death penalty statute. Captain McLarity responded in the affirmative. Both Evans and petitioner then stated that they intended to plead guilty and seek the death penalty. Indeed, petitioner stated that he hoped he could be executed within sixty days. There was no talk of the preclusion clause during that discussion. Like Agent Juel, Captain McLarity stated, the death preference statement was so unique that he could not forget it; he had never heard anything like it before. (Testimony of Officer McLarity at the

evidentiary hearing.) The Court finds that at the time petitioner made those statements and expressed that intent, he had no knowledge of the procedural aspects of Alabama's capital punishment statute, the preclusion clause, or the sentence alternatives available under the statute. (Testimony of Officer McLarity and Ritter at the evidentiary hearing).[3]

11. Continuously, from the first day he arrived back in Alabama, which was on or before March 11, 1977, throughout his entire trial and sentencing proceedings, petitioner intentionally and stubbornly pursued a course of actively assisting the prosecution in proving beyond a reasonable doubt that he was guilty of the capital offense and that he deserved the death penalty. He did so as early as in his formal interview with Mobile police officers (Exhibit 1, 288-292); at the

Grand Jury, before whom he insisted on appearing (Exhibit 1, 24, 338-347); at arraignment where he entered an oral guilty plea (Exhibit 1, 27, 59-60); and at trial when he entered a written guilty plea and took the stand to testify against himself. (Exhibit 1, 207-10, 216-221, 252, 283). When the jury verdict convicting him of the capital offense and fixing his punishment at death was read, petitioner turned, smiled, and gave a "thumbs up" gesture of approval. (Exhibit 2, television tape of testimony).

12. Petitioner's course of actively admitting his guilt of the capital offense and seeking the death penalty continued at least up through the Alabama Supreme Court's first decision in the case, which was entered on May 19, 1978. Evans and Ritter v. State, 361 So.2d 666, 667 (Ala.1978) ("[N]either petitioner has expressed dissatisfaction

with his conviction nor his death sentence....")

13. The course of conduct described in the preceding paragraphs was freely, knowingly and voluntarily undertaken by petitioner against the repeated and emphatic advice of his able and experienced attorney. (Exhibit 1, 22-23, 24, 48-54, 57-59, 217-220, 284, 318-320; testimony of attorney Reggie Stephens and of petitioner at the evidentiary hearing.) As the Alabama Court of Criminal Appeals found regarding both petitioner and his co-defendant Evans:

> The able attorneys appointed to represent the appellants have been given a most perplexing responsibility. Here again, over their specific advice, and over their objections, each appellant went before the Mobile County Grand Jury and openly testified as to his

involvement in the robbery and murder of Edward A. Nassar.

When each appellant appeared at arraignment, against the advice of his attorney and over the advice of the trial court, he entered a guilty plea. At trial, each appellant, again against the advice of his attorney's objection, took the stand and openly admitted his participation in the robbery and murder of Edward A. Nassar.

These attorneys have performed a great public service at considerable sacrifice to themselves. Each appellant admitted that he had no complaint with the caliber of representation, and that his attorney had fully advised him at each step of the proceedings of his constitutional rights.

Beyond question, there can be no fault, or suggestion of fault, attributed

to the caliber of representation of each appellant by his respective attorney.

This court specifically finds that both Evans and Ritter were fully, fairly, and thoroughly represented by these attorneys.

Evans v. State, 361 So.2d 654, 661-662 (Ala. Cr.App.1977).

14. As a result of confessions that he freely and voluntarily gave after being advised of and waiving his Miranda rights, including confessions he gave to the FBI agents before he knew anything about Alabama's capital punishment statute, petitioner had detainers from at least five different states lodged against him. Those detainers involved multiple charges of armed robbery, kidnapping, aggravated kidnapping, aggravated burglary, and aggravated robbery. (Exhibit 1, 233, 349-354, 365, 358, 365-367;

Exhibit 3.) In addition, those states and other states would have brought additional charges and lodged additional detainers against the petitioner if he had not been sentenced to death in Alabama. (Exhibit 1, 233.)

15. At the time petitioner undertook the self-destructive strategy that he pursued in the Alabama court system, the petitioner knew that even if he somehow could have escaped the death penalty and obtained parole in Alabama, he would never have finished serving the prison sentences he would have received for all of the violent felonies he had confessed to committing in other states. (Exhibit 1, 346; testimony of petitioner at the evidentiary hearing.) In addition, petitioner had violated parole from a previous robbery sentence to begin this multi-state crime spree (Exhibit 1, 230, 243, 338), and

he believed that he would never be paroled again no matter what happened in Alabama. Petitioner also admitted at the hearing, even if he had somehow been eligible for and had received a parole from his Alabama crimes, other states were waiting with enough charges to give him more sentences than he could serve in five lifetimes. (Testimony of petitioner at evidentiary hearing.)

16. It is apparent to the Court, based upon the above-described findings of fact, that the reason petitioner pursued the self-destructive course of action that he did through the Alabama court system was his preference for death over a long prison sentence or series of long prison sentences. Evans v. State, 361 So.2d 654, 662 (Ala.Cr. App.1977) ("This court is convinced that each appellant is sincere in seeking the

death sentence, preferring this course to a long prison sentence.") (Exhibit 1, 259, 346; testimony of Dr. Brown,[4] Agent Hardin, Agent Juel, and Captain McLarity.) Because of the circumstances specified in the preceding paragraph, petitioner made no distinction between a life sentence and a life without parole sentence. (Testimony of Attorney Reggie Stephens at the evidentiary hearing.)

17. The only other factor that possibly contributed to petitioner's course of conduct was his appetite for publicity and notoriety and his desire for news media attention, which petitioner referred to as having the effect of a drug. (Testimony of petitioner at the evidentiary hearing.) However, even if there had been no news media coverage and publicity, petitioner would still have pursued the same course of action

he did. This is apparent because his intention to pursue that course of action was formulated and first announced before petitioner returned to Mobile, Alabama and before meeting with the press. (Testimony of Agents Hardin and Juel, and Captain McLarity.)

18. Petitioner's claim, that he would have undertaken a different course of conduct in the Alabama court system had it not been for various provisions of the Alabama capital punishment statute, lacks credibility and other than petitioner's self-serving statements at the evidentiary hearing, has no basis in the evidence whatsoever. The testimony of all of the witnesses at the hearing, including the testimony of his former attorney, supports the finding of fact that petitioner's determination to seek the death penalty and adopt a concomitant

trial strategy was made before he returned to Mobile for trial and without any knowledge whatsoever of Alabama criminal procedure. Petitioner's claim that he would have undertaken a different course of conduct in the Alabama court system had it not been for various provisions of the Alabama capital punishment statute is also contradicted by his own testimony at trial. (Exhibit 1, 207-208, 216-221, 283, 344-347.) In assessing petitioner's credibility in this matter the Court also considers the fact that many or most of the charges against petitioner in other states have been dropped due to speedy trial problems. Thus, petitioner now might not spend all of his life in jail if for some reason his conviction was reversed and he was charged with and found either innocent or guilty of a lesser included offense. Thus petitioner's original reason for

preferring death over life imprisonment to longer exists. (Petitioner's testimony at the evidentiary hearing.)

19. And based upon petitioner's testimony at the evidentiary hearing the Court will also find that at no time did any state or federal officer, agent, or official coerce the petitioner, mistreat him, or violate any of his rights in any way. Petitioner has at all times been treated courteously and with the utmost respect for his person and constitutional rights. (Exhibit 1; testimony at the evidentiary hearing.)

20. The reason that the petitioner is facing a death sentence is not the result of any peculiarities of the capital punishment statute under which he was tried. Rather, the petitioner is facing a sentence of death as a result of his own criminal conduct and his having adopted a legal strategy, however

unwise, which was adopted freely, knowingly, and voluntarily by the petitioner himself for which no other person or factor is responsible. The Court cannot help but note that as attorney Stephens testified at the evidentiary hearing, the petitioner obtained exactly what he wanted.

21. Based upon all of the evidence, the Court finds beyond a reasonable doubt that the course of action petitioner followed at the pretrial, trial, sentencing, and initial appellate stages of the Alabama court system was not caused by or influenced by any aspect of Alabama's capital punishment statute or the sentence alternatives available under it. The Court believes that the petitioner would have followed the same course of action no matter how Alabama's capital punishment statute had been drawn or structured. The Court further finds that beyond a

reasonable doubt petitioner was not prejudiced by the "preclusion clause" as it pertained to his trial tactics.

C. Sentencing Procedures

22. At the time petitioner and Evans began their cross country spree, petitioner was on parole for robbery. (Exhibit 1, 243, 338). The crime spree lasted about two-and-a-half months and involved approximately three dozen felonies. Under oath in front of the Grand Jury, petitioner testified his "vocation" was armed robbery because it was easy and he was good at it. (Exhibit 1, 347). At trial he testified under oath that if he were ever freed he would pursue the life of a professional criminal and that, "if it became necessary, I would [kill again]." Exhibit 1, 221).

23. Petitioner failed to show any remorse prior to or during his sentencing.

In fact [as will be noted many times in the course of this opinion] he in effect boasted that he would have shot Edward Nassar if necessary, and would kill again if the future if allowed to go free. (See Exhibit 1, 217-221, 340-345).

24. At every stage of the state trial court proceedings petitioner actively sought the death sentence. (See Findings of Fact 9-21, supra). He filed a written "Request to Enter Guilty Plea" which was admitted into evidence and went to the jury." (Exhibit 1, 207-208, 252, 283). He took the stand and admitted all elements of the capital offense, and threatened the jurors with harm if they did not convict him and sentence him to death. (Exhibit 1, 216-221). At the time he threatened the jury, he was smiling or grinning and appeared to be menancing

and extremely dangerous. (Exhibit 2, Video tape of Trial Testimony).[5]

25. Following the testimony of petitioner, and similar testimony by his co-defendant John Lewis Evans (Exhibit 1, 211-216), the jury retired for deliberations, and within fifteen minutes returned a verdict of guilty. At that time under Alabama law the guilty verdict in a capital murder case also "fixed" petitioner's sentence at death. (Exhibit 1, 29, 226-227). Petitioner gave the "thumbs up" gesture of approval upon hearing the verdict. (Exhibit 2).

26. In addition to the evidence which was presented during the guilt stage of the trial, at the sentencing hearing the State introduced the following: The Grand Jury testimony of petitioner and Evans; petitioner's prior record; an additional lengthy

confession petitioner gave the FBI which recounted his many criminal activities; a summary of the crime spree based on their statements to Mobile police officers; and a number of warrants received from other states indicating that they would attempt to extradite and prosecute petitioner if he was not sentenced to death in Alabama. (Exhibit 1, 229-233). All of this additional evidence was presented without objection. (Exhibit 1, 231-233.) Petitioner submitted no evidence at the sentencing hearing.

27. After deliberation, the trial court entered written findings concerning the aggravating and mitigating circumstances. (Exhibit 1, 243-247.) The Court found the following four aggravating circumstances in petitioner's case:

(a). The Court finds that the Capital Felony was committed by Mr. Ritter while

he was under sentence of imprisonment although he was serving the remainder of his sentence on parole at the time;

(b). The Court finds that Mr. Ritter has been previously convicted of another felony involving the use or threat of violence to the person: to-wit: the offense of robbery;

(c). The Court finds that Mr. Ritter has knowingly on approximately thirty-nine previous occasions created a great risk of death to many persons;

(d). The Court finds that the Capital Felony was committed while Mr. Ritter was an accomplice in the commission of a robbery;

(Exhibit 1, 243-244.) The trial court found one statutory mitigating circumstance: age at the time of the crime (23 years old); and one non-statutory mitigating circumstance:

the fact that no attempt was made to harm Mr. Nassar's two young daughters who were present when their father was murdered. (Exhibit 1, 246). The Court found that the aggravating circumstances "far outweigh" the mitigating circumstances; adjudged petitioner guilty of the capital offense charged in the indictment; "and specifically of intentionally killing Edward A. Nassar during the robbery or attempt thereof;" and sentenced him to death. (Exhibit 1, 246-247.)

28. On direct appeal the Alabama Court of Criminal Appeals considered and upheld the propriety of the death sentence for petitioner and his co-defendant Evans. In doing so that court held:

> The aggravating circumstances were here averred and proved at trial, and also determined by the trial judge in a public hearing, as required by law.

In addition, this Court has weighed the aggravating and mitigating circumstances independently.

As stated by Harris, J., in Jacobs [v. State, 361 So.2d 607 (1977)], supra,

> 'The aggravating circumstances found by the trial court are amply supported by the evidence in this case. The verdict of the jury is overwhelmingly sustained by a preponderance of the evidence.'

Additionally, this Court has weighed the various factors presented by this record, and is of the opinion that the punishment here imposed fits the crime for which each appellant has been found guilty thereof.

Evans v. State, 361 So.2d at 662.

29. In its sixth and final decision in this case, the Alabama Supreme Court

addressed the sentencing procedure claims which petitioner has raised as Claims No. 3, 4, and 5 of this habeas petition. Ritter v. State, 429 So.2d 928 (Ala.1983). In doing so, the Alabama Supreme Court stressed that, "[t]he uniqueness of the facts of Ritter's case merit particular emphasis ..." and after considering those facts it concluded that: "[w]e in nowise find the sentencing procedure here provided and employed, prejudicial to Ritter." Id. at 935.

30. At the evidentiary hearing held in this habeas petition, petitioner's own trial counsel testified that in his opinion petitioner would still have been sentenced to death even if the mandatory jury verdict form requirement had not existed. (Testimony of attorney Stephens at the evidentiary hearing.)

31. Based upon a careful examination of the state trial court record and consideration of the testimony presented at the evidentiary hearing in this case this Court finds beyond a reasonable doubt that there is no evidence that petitioner was harmed or prejudiced in any way by the existence of the mandatory jury verdict form requirement or any other aspect of the sentencing procedure employed in this case.

32. Based upon a careful examination of the state trial court record and consideration of the testimony presented at the evidentiary hearing, this Court finds beyond a reasonable doubt that petitioner would still have been sentenced to death even if the mandatory jury verdict form requirement and other aspects of the sentencing procedure about which he now complains had not been employed at his trial.

33. Given the facts and circumstances of this case, including but not limited to the fact that the petitioner threatened to harm the jury if he was not sentenced to death, this Court finds beyond a reasonable doubt that no sentencing authority could reasonably have sentenced petitioner to anything other than death regardless of the sentencing procedure employed.

D. Jury Charge

34. Petitioner claims that the trial court's jury charge at Exhibit 1, 222-225, was deficient. Both the petitioner and his trial counsel, attorney Stephens, testified at the evidentiary hearing that petitioner freely and voluntarily instructed his trial counsel not to object to any major points at trial, not to "muddy the water," and not to submit any written requested jury instructions to the trial court judge. Petitioner

did not object to the jury charge at the time of the trial, nor did he submit any written requested jury charges. (Exhibit 1, 225-226.) Based upon the testimony of the petitioner and attorney Stephens, the Court finds beyond a reasonable doubt that the sole reason for the failure of the petitioner to object to the jury charge at the time of trial and to submit any requested jury charges was that the petitioner had instructed his attorney not to do so.

E. Intent

35. Petitioner also claims that his sentence of death is disproportionate because he did not kill, attempt to kill, or intend to kill Edward Nassar. All of the testimony at all stages of these legal proceedings indicates that petitioner neither killed nor made an actual attempt to kill Edward Nassar. Conversely, as discussed below, all

testimony up to the evidentiary hearing on his habeas petition has been to the effect that petitioner had the requisite intent to kill.

36. In all or virtually all of the more than three dozen violent felonies that he and Evans committed during their two-and-a-half month long crime spree, petitioner was armed with a loaded, deadly weapon. (Exhibit 1, 212-213, 324, 339-340; testimony of petitioner at evidentiary hearing.) And although it is true that Evans shot Edward Nassar, at the time of the shooting petitioner was loading or had loaded a pistol with live ammunition for use in the robbery. (Exhibit 1, 221, 346; testimony of petitioner at evidentiary hearing.)

37. On March 8, 1977, petitioner, after being advised of his Miranda rights and freely and voluntarily waiving them,

voluntarily admitted to FBI agents in Little Rock, Arkansas that he would have shot and killed Edward Nassar if Evans had not done so first. (Testimony of Agents Hardin and Juel at the evidentiary hearing.)

38. On April 4, 1977, petitioner voluntarily appeared before the Mobile County Grand Jury, and against the advice of his attorney freely testified at length concerning his participation in the robbery and murder of Edward Nassar. (Exhibit 1, 338-347.) During his testimony in front of the Grand Jury the petitioner was asked:

Q: Uh, were you there, uh, to stand ready and assist and aid John Evans in any way that was necessary to accomplish the armed robbery?

A: Yes.

Q: And that went as far as shooting Edward Nassar had you had the opportunity?

A: Yes.

(Exhibit 1, 341.)

Q: Uh, if you ever had to shoot someone in an armed robbery, would you have done so?

A: If it was a choice between them and me, I would've.

Q: Alright. Did both you and John make a pact together or agreement together to assist and aid each other under any set of circumstances and if it meant taking a life, would you do so?

A: Yes.

(Exhibit 1, 343-44.)

Q: Uh, yet you would kill an individual if it became necessary to—to escape

or to assist your accomplice, John Evans?

A: Yes, I would.

Q: If you were given the opportunity to be turned back onto the streets or go back free, uh, what occupation would you pursue?

A: Probably robbery.

Q: And, uh, if it became necessary to kill other individuals in that occupation would you do so?

A: Yes.

(Exhibit 1, 344-45.)

39. At his arraignment on April 18, 1977, petitioner plead guilty to the indictment charging him with the capital offense. (Exhibit 1, 27, 59-60.) Petitioner's guilty plea was accepted (Exhibit 1, 27.), but in full compliance with the requirements of the subsequent decision in Prothro v. State, 370

So.2d 740 (Ala.Cr.App.1979), the trial court ordered the matter submitted to a jury. (Exhibit 1, 60.) And at petitioner's trial, which began on April 26, 1977, after the state had presented its case, petitioner filed a written "Motion to Enter Guilty Plea" which was admitted into evidence and which went to the jury. (Exhibit 1, 207-208, 252, 283.)

40. Petitioner also took the stand, against the advice of his attorney, and admitted each of the elements of a capital offense. (Exhibit 1, 216-221.)

41. On direct examination the petitioner testified as follows:

A: ...the plan was that I was to ask to see a pistol. I had some .38 caliber ammunition in my left hand, and we went in, I asked Mr. Nassar to see the gun, he handed it to me, I opened

it up, looked at it, John started to draw his gun, and I started loading the pistol he showed me. Immediately, Nassar dropped down and started going around the corner, which was an "L" shape, the counter, then towards the office. He got to the office, reached up with, I believe, his left hand, to a counter or something, and that's when he was shot. We knew he was going for a gun. He wouldn't have hesitated to kill us, so he had to be killed. There was no other way....

Q: Mr. Ritter, do you want to say anything to these people sitting on the jury box as to what you want them to do when they get back there?

A: Well, I think there are two considerations. First, we did kill Mr.

Nassar. We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that was what was going to happen....

(Exhibit 1, 219-220.)

42. And during petitioner's testimony at his state court trial, he testified as follows on cross-examination:

Q: I noticed in your confession (given to the Mobile Police Department) where you said you wouldn't say who shot Mr. Nassar, is that correct?

A: That's correct.

Q: I want you to turn and look at the Jury, if you will, Mr. Ritter, and tell that jury if you had an opportunity, to kill Mr. Nassar, would you have killed him?

A: My gun was loaded, and I would have killed him, yes.

Q: You stood ready to assist your cohort in crime in anyway you could, and that went as far as shooting Mr. Nassar in the back if you had to do so.

A: Yes. John was in my line of fire, but I was there in case he missed.

Q: And if you walked out of this courtroom here today, or if you were ever allowed to walk out of any courtroom, any penitentiary from now until any time in the future, what profession would you start back into?

A: Armed robbery.

Q: And if you had to kill again, would you do it?

A: If it became necessary, I would.

(Exhibit 1, 221.)

43. During its oral charge to the jury, the trial court instructed the jury that petitioner could not be convicted of the capital offense unless he had, "an actual or positive intent to kill." (Exhibit 1, 223) The jury convicted petitioner of the robbery-intentional killing capital offense and the trial court judge adjudged petitioner guilty of the capital offense, "and specifically of intentionally killing Edward A. Nassar during the robbery or attempt thereof." (Exhibit 1, 246.)

44. Following an affirmance of the petitioner's conviction and sentence by the Alabama Court of Criminal Appeals in Evans v. State, 361 So.2d 654 (Ala.Cr.App. 1977), the Alabama Supreme Court granted certiorari as a matter of right pursuant to Alabama Rule of Appellate Procedure 39(c). The Alabama Supreme Court issued an opinion

remanding petitioner's case to the Court of Criminal Appeals for consideration of the non-triggerman issue which the Court of Criminal Appeals had not previously addressed. Evans v. State, 361 So.2d 666 (Ala.1978).

45. On remand, the Court of Criminal Appeals again upheld petitioner's conviction and sentence even though petitioner did not actually fire the shot that killed Mr. Nassar. Ritter v. State, 375 So.2d 266, 267 (Ala.Cr.App.1978). The court held that under Alabama's capital punishment statute the felony murder doctrine could not be used to supply the requisite intent to kill, and held that it was not used in petitioner's case. Id. Instead, the Court explained:

> In brief, it was really simply a matter of logistics that Ritter did not also fire his weapon, i.e., his companion

Evans, according to his own statement, was in his line of fire.

In our original opinion, and in this extension this court had carefully reviewed all of the evidence and did not, and does not now, rely upon the felony murder doctrine to imply evidence of intent on the part of Ritter in this cause.

To the contrary, Ritter's active participation in the Nassar murder supplies the requisite intent for an intentional killing necessary under Section 13-11-2(a), Code of Alabama, 1975, which is the aggravated offense of robbery when the victim is intentionally killed by the defendant. Id. (Emphasis in original.)

46. In a separate concurrence, Judge Bookout, of the Court of Criminal Appeals, stated:

I believe the facts of the instant case bring the appellant within the capital felony statute via the accomplice statute. He could be charged equally with Evans for the murder of Edward Nassar even though he did not personally fire the weapon. In planning the robbery, Evans and Ritter had discussed that they might have to kill someone during the course of the robbery. Ritter stated that he would have shot Nassar if Evans had not been in his line of fire. Each would therefore be guilty equally under the accomplice statute. Howell v. State, Ala.Crim.App., 339 So.2d 138 (1976).

375 So.2d at 269.

47. Following remand, the case once again returned to the Alabama Supreme Court. After examining the record, the Alabama Supreme Court found that the felony murder

doctrine had not been used to convict Ritter of a capital offense and that the evidence established that Ritter possessed the requisite intent to kill:

> From the foregoing it is clear that the felony-murder doctrine was not used in this trial. (Indeed, it was never even mentioned.) Instead, Ritter could be convicted and sentenced to death under our capital felony statute as an accomplice in the intentional killing of Nassar. (There was also evidence from which the jury could have found that Ritter, aside from his status as an accomplice, had particularized intent to kill....) The question then becomes, did the State prove that Ritter was an accomplice to the intentional killing? We think that it did. Through Ritter's confession and again through his voluntary statements at

trial the State showed that Ritter and Evans had a prior agreement that anyone that attempted to go for a gun would be killed. This possibility was discussed beforehand and planned for. As Ritter himself stated, the only reason he did not shoot Nassar himself was because Evans was in the way. Clearly Ritter encouraged and supported the killing and was present with Evans' knowledge to render assistance should it become necessary.

Ex Parte Ritter, 375 So.2d 270, 274-275 (Ala.1979). Thus, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court have made factual findings that under Alabama law the petitioner had the legally requisite intent to kill.

48. And in Ritter v. State, 375 So.2d at 275 (Ala.1979), the Alabama Supreme Court

also considered and addressed the disproportionality issue:

> Ritter also contends that the death penalty is a disproportionate sentence in light of his involvement in the capital felony and therefore violates the Eighth and Fourteenth Amendments. Ritter attempts to bolster his position by portraying himself as a mere accomplice to the robbery, "a minor participant" in a crime which led to a killing by someone else. The record, however, refutes this description of Ritter's part in the crime at every point. It was Ritter, not Evans, who asked to see a .38 caliber Colt revolver, who began to load it with ammunition he had brought with him specifically for this purpose, and who carried the revolver out of the pawn shop after Nassar was shot. Thus Ritter could

not seriously be considered a "minor participant" in the robbery, and, as we have noted above, he was clearly an accomplice to the killing.

With this more accurate description of Ritter's participation in the intentional killing and robbery in mind we must consider whether the death penalty is a disproportionate sentence for an accomplice to the killing. This is a question which has not yet been decided by the United States Supreme Court, although several cases before the Court have raised the issue.... In each of these cases the court reversed on other grounds. It did not reach the issue of disproportionality. While we opine that there may be situations where an accomplice's participation is so minor that the death penalty would be constitutionally impermissible,

such is not the case here. As the trial judge stated, Ritter's participation was not relatively minor. The Court of Criminal Appeals agreed, and so do we. Ritter stands at the most culpable end of the spectrum of accomplice liability. He is closer to an individual who fires a non-fatal shot in a killing rather than one who waits outside as a lookout. By Ritter's own statement it was mere fortuity which made John Evans the triggerman and not Ritter. Consequently, we see no constitutional infirmity in imposing the death sentence in this case. (Citations omitted)

Thus, the Alabama Supreme Court again reiterated its findings that petitioner possessed the requisite intent to kill Mr. Nassar and would have killed him had Evans not

done so, and, accordingly, his sentence of death was not disproportionate.

49. In addition to the factual findings of the Alabama Appellate Courts, this Court, based upon the evidence adduced at the hearing, finds independently beyond a reasonable doubt that petitioner intended the death of Mr. Nassar. The Court finds particularly compelling the evidentiary hearing testimony of FBI Agents Hardin and Juel. Both testified that the petitioner told them in an interview on the day following his capture that he (petitioner) would have killed Mr. Nassar if Evans had not done so. This testimony, which was apparently not presented at petitioner's trial, adds considerably to what was, until petitioner's testimony at the evidentiary hearing, uncontested evidence of petitioner's intent as it relates to the death of Mr. Nassar. In assessing

petitioner's veracity on his testimony at the evidentiary hearing as to his intent, the Court cannot but be aware that his denial of any intent to kill Mr. Nassar was made more than six years after his trial and in the face of death by electrocution. His motives in changing his story at this late date are obvious, and the Court simply does not believe him. (See also Fact 18, re: detainers in other states.) Accordingly, the Court finds beyond a reasonable doubt, based upon the testimony of FBI Agents Hardin and Juel, as well as petitioner's statements and testimony in the state criminal proceedings prior to the evidentiary hearing, that petitioner and Evans had an agreement to aid each in the commission of any crimes they carried out, including the killing of any persons if necessary; and pursuant to this general agreement that

petitioner stood ready and able to kill, if necessary, in the robbery of Mr. Nassar's pawn shop; and that John Evans was aware, of petitioner's support; indeed, he would have killed Mr. Nassar if required; and that the only reason why he did not do so is that John Evans relieved him of the burden. In essence, petitioner was not so much a non-triggerman, but was rather an unneeded trig-german.

III. CONCLUSIONS OF LAW

Petitioner alleges ten claims upon which he believes habeas relief ought to be granted. The Court addresses them in the order they are presented and concludes that each of the claims is without merit.

A. Preclusion Clause. In Claim 1 (Para. 47-62) petitioner asserts that he was prejudiced by the 1975 Alabama Capital Punishment

Statute which contained a lesser included offense "preclusion clause." Code of Alabama, 1975, Section 13-11-2(a) provided:

> (a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with aggravation shall not include any lesser offenses. (emphasis added)

That clause was found to be constitutionally infirm in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

Petitioner claims this clause prejudiced him in two ways. First, he claims that the "preclusion clause" was a factor in his decision to adopt a trial strategy which resulted in his receiving a death sentence.

See Hopper v. Evans, 456 U.S. 605, 613-14 & *; 102 S.Ct. 2049, 2054 & *; 72 L.Ed.2d 367, 374 & *. More specifically, he claims that because of his knowledge of the "preclusion clause", he knew that he would be charged with a capital crime, and not some kind of lesser included offense, and that in Alabama a person convicted of a capital crime must be sentenced to death or life imprisonment without parole. He was, he claims, certain that given the circumstances of his crime, he would be convicted of a capital offense. He goes on to allege that given a choice between life in prison and death, he preferred death. As a result he adopted a trial strategy insuring that he would be convicted and sentenced to death. He further claims that had it not been for the "preclusion clause", he would have adopted a different trial strategy in which he would have waged

a vigorous defense. Petitioner's second claim is that regardless of his trial strategy, based upon the evidence adduced at his trial, he should have received an instruction on the lesser included offense of felony murder. Such an instruction could not be given because of the "preclusion clause".

[1] 1. Trial Strategy. This Court has already found as fact that not only was petitioner unaware of the preclusion clause at the time he decided to adopt a trial strategy insuring the death penalty, but rather his decision to adopt such a strategy was the result of the many felonies which he had committed and confessed to in interviews with FBI agents. (Findings of Fact 2-21.) As a result of his confession to those many other crimes, plus the likelihood of a conviction for a serious offense in Alabama,

petitioner knew that he would spend the rest of his life in jail; and this prospect was more onerous to him than death. It was for this reason, not any aspect of the "preclusion clause", or any other aspect of Alabama's substantive or procedural criminal law, that petitioner decided to seek the death penalty. Thus, the Court has found that petitioner's decision to adopt a trial strategy, in which on several occasions he freely confessed to the crime of murder, and in which he testified in front of the grand jury and during the trial, was not in any way related to the "preclusion clause". The Court, therefore, concludes beyond a reasonable doubt that petitioner was not prejudiced in any fashion by the "preclusion clause" as it may have related to petitioner's trial strategy. Hopper, supra; and

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[6]

[2] 2. Lesser Included Offense Instruction. The essence of this claim is that petitioner gave four separate statements related to his culpability in the murder of Edward Nassar before or during his trial. He further claims that in two of them, one made to the FBI (Exhibit 1 at 303-04), and another to the Mobile Police Department (Exhibit 1 at 192-94) there was evidence indicating that he did not intend the death of Edward Nassar. Accordingly, he argues, he was entitled to an instruction on the lesser included offense of felony murder as a matter of both Alabama[7] and Federal constitutional law.[8]

The petitioner in Beck, supra, 447 U.S. at 629-630, 100 S.Ct. at 2385-86, 65 L.Ed.2d at 398, admitted robbing one Roy Malone, but

> Consistently denied, however, that he killed the man or that he intended his death. Under petitioner's version of the events, he and his accomplice entered their victim's home in the afternoon, and, after petitioner had seized the man intending to bind him with a rope, his accomplice unexpectedly struck and killed him. As the State has conceded, absent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder as a matter of state law.[9]

Based upon these facts, the United States Supreme Court in Beck struck down the lesser included offense preclusion clause, holding that a sentence of death may not be constitutionally "imposed after a jury verdict of guilt of a capital offense, when the jury

was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and ... when the evidence would have supported such a verdict ...." (emphasis added) 447 U.S. at 627, 456 S.Ct. at 2384, 65 L.Ed.2d at 396.

In Hopper v. Evans, 456 U.S. 605, 606, 102 S.Ct. 2049, 2050, 72 L.Ed.2d 367, 369-70 (1982), the United States Supreme Court "granted certiorari to determine whether after invalidation of a state law which precluded instructions on lesser included offenses in capital cases, a new trial is required in a capital case in which the defendant's own evidence negates the possibility that such an instruction might have been warranted." (emphasis added) The Court in limiting its holding in Beck, supra, held in the negative: "... due process requires that a lesser included offense instruction

be given only when the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. at 611, 102 S.Ct. at 2053, 72 L.Ed.2d at 373. (emphasis in original) The court went on to hold that the Alabama rule on entitlement to a lesser included offense instruction does not offend federal constitutional standards. Id.[10] 456 U.S. at 612, 102 S.Ct. at 2053, 72 L.Ed.2d at 373.

Following an analysis of Evans' testimony, the Hopper Court concluded that Evans had the requisite intent to kill, and that he had suggested "no plausible claim which he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial." Id. 456 U.S. at 613, 102 S.Ct. at 2054, 72 L.Ed.2d at 374. In an accompanying footnote, the Court stated that no plausible claim of prejudice could be made because

Evans "... confessed that he shot the victim and then pleaded guilty to capital murder." (Id.)

On remand from the United States Supreme Court, the Alabama Supreme Court addressed the lesser included offense instruction issue in petitioner's case in light of Hopper and concluded that petitioner, like Evans, "affirmatively negated any claim that he did not intend to kill the victim. An instruction on the offense of felony-murder, or any other lesser offense, was therefore not required. Consequently, we find the preclusion clause did not prejudice respondent in any way and a new trial is not warranted". Ritter v. State, 429 So.2d 928, 933 (Ala. 1983).

The basis for that conclusion of law had been explained earlier in Ex Parte Ritter, 375 So.2d 270 (Ala.1979). In that case the

Alabama Supreme Court, following remand to the Alabama Court of Criminal Appeals, determined that under the evidence produced at trial, petitioner had legally sufficient intent to be convicted of capital murder.[11] That determination was based on three factors: petitioner's testimony at his trial; "accomplice liability" under Alabama law as interpreted by the Alabama Supreme Court; and the distinction under Alabama law between accomplice liability and the felony murder doctrine.

The Alabama Supreme Court first noted that under the capital felony statute evidence of intent could not, pursuant to Code of Alabama, 1975, Section 13-11-2(b), "be supplied by the felony-murder doctrine." Id. at 273. Under felony-murder,

> It is not necessary that the individual accused of murder should have

> contemplated, intended, or willed the death of the victim .... Culpability stems instead from the accused's participation in an inherently dangerous felony —one in which he should have known that there was a substantial possibility that someone would be killed.

Id. at 273-74. In Alabama felony-murder is a non-capital crime punishable by life imprisonment. Id. at 274. The court stated, "as one commentator has observed, '[T]he death penalty is an untenable sanction for negligent or accidental homicide.'" Id.

But as the court went on to hold, petitioner's intent was not supplied by the felony-murder doctrine:

> The legislature did, however, indicate that an accomplice in a capital felony could be sentenced to death under our statute, for it included accomplice

liability as a factor to be considered during the sentencing hearing under both aggravating circumstances, § 13-11-6(4), and mitigating circumstances, § 13-11-7(4). The significant distinction between use of the felony-murder doctrine and use of accomplice liability in this context is that accomplice liability requires a greater showing of the defendant's individual intent. Under Alabama law, in order to hold an individual as an accomplice the State must prove that he aided and abetted in the crime, terms which "'comprehend all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary.'" Jones v. State, 174 Ala. 53, 57 So. 31 (1911). As we noted in Jones, key elements of accomplice

liability are encouragement or presence "with a view to render aid should it become necessary." When liability is predicated on the latter it is essential that the principal be aware of the accomplice's support and willingness to lend assistance. Jones, supra. Thus an accomplice while he may not have actually committed the crime by delivering the blow or firing the shot, has sanctioned and facilitated the crime so that his culpability is comparable to that of the principal. In Alabama, as in many states, this premise is statutorily recognized in § 13-9-1 which abolished the old common law distinctions among accessories before the fact, principals in the second degree and principals in the first degree and provides that "...all persons concerned in the commission of a felony,

whether they directly commit the act constituting the offense or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals...."

From the foregoing it is clear that the felony-murder doctrine was not used in this trial. (Indeed, it was never even mentioned.) Instead Ritter could be convicted and sentenced to death under our capital felony statute as an accomplice in the intentional killing of Nassar. (There was also evidence from which the jury could have found that Ritter, aside from his status as an accomplice, had the particularized intent to kill. Of course, it is not contended that Ritter is not fully liable as a principal for the robbery.) The question then becomes, did the State prove that Ritter

was an accomplice to the intentional killing? We think it did. Through Ritter's confession and again through his voluntary statement at trial the State showed that Ritter and Evans had a prior agreement that anyone who attempted to go for a gun would be killed. This possibility was discussed beforehand and planned for. As Ritter himself stated, the only reason he did not shoot Nassar himself was because Evans was in the way. Clearly Ritter encouraged and supported the killing and was present with Evans' knowledge to render assistance should it become necessary.

Id. 274-75.

An analysis of the four separate statements given by the petitioner before and during his trial indicates there are no contradictions between his earlier statements

and his trial testimony as they relate to "accomplice liability". (This Court has already stated in the Findings of Fact why it gives no credence to petitioner's exculpatory testimony at the evidentiary hearing.) Petitioner's statement given to the FBI on March 8, 1977, as it pertained to the murder of Edward Nassar, was cursory and part of a long inventory of crimes committed by him and John Evans during their crime spree. (Exhibit 1, 303-304.) Petitioner's statement given to the Mobile Police Department is sketchy and void of any discussion on the issue of intent, Id. 192-194, and was in effect disclaimed by him at trial. (Exhibit 1, 221, and see Finding of Fact 42.)

It is in his testimony before the Grand Jury in which he gives evidence relevant to intent and first states he would have shot Edward Nassar, Id. at 340, if he had the

opportunity. Id. at 341. When asked if he was there "...to stand ready and assist and aid John Evans in any way that was necessary to accomplish the armed robbery," he replied, "Yes." Id. at 341. And that included the shooting of Edward Nassar. Id. When asked if he ever "had to shoot someone in an armed robbery, would you have done so?" he replied, "If it was a choice between them and me, I would've." Id. at 343. Furthermore, he and Evans had entered into a pact to assist each other under any circumstances including the taking of a life. Id. at 344. When asked by one of the members of the Grand Jury if he had ever killed anyone, he replied, "Other than Mr. Nassar, no." Id. at 347. And, "Uh, well, really, under the law it doesn't matter whether I pulled the trigger or not, I was there and I would have ...." Id. His trial testimony was

even more explicit. (See Exhibit 1, 216-221 and Exhibit 2: Video tape of Trial Testimony)

Nowhere is there any conflict between these four statements. When viewed as a whole, the evidence is uncontested that petitioner had confessed to all of the elements necessary for conviction of capital murder under the theory of accomplice liability as interpreted by the Alabama Supreme Court.[12] Accordingly, this Court concludes that as a matter of Alabama state law there was no basis in the evidence for an instruction on a lesser included offense. Chavers v. State and Fulghum v. State, n. 7 supra. This Court further concludes beyond a reasonable doubt that under federal constitutional law, where petitioner, as here, has negated any possibility that an instruction on a lesser included offense be given

through his own testimony at trial and guilty plea, he has not been prejudiced within the meaning of Beck v. Alabama, supra, as limited by Hopper v. Evans, supra. See also discussion of constitutional harmless error rule at Section III C, infra.[13]

B. Inadequacy of Jury Charge. Petitioner's Claim 2 asserts that the jury charge given by the trial judge during the guilt phase of the trial was perfunctory and inadequate. This Court has found as fact that petitioner's attorney failed to object to the jury charge at the time of trial, and also failed to submit any proposed written jury instructions. This Court has also found as fact that said failure to object to the jury charge was solely the result of petitioner's decision to adopt a trial strategy in which he would seek the death penalty, and that said strategy was in no

way a product of the Alabama preclusion clause. The Alabama Courts have ruled petitioner was adequately and professionally represented, and petitioner has not challenged that ruling in this petition. Evans v. State, 361 So.2d at 661-662 (1977).

[3] Under Alabama law, an error of commission (misstatement of law) in the oral charge to the jury is waived unless a timely and specific objection is made to it in the trial court. See Hill v. State, 409 So.2d 943, 944 (Ala.Cr.App.1981), cert. den., No. 81-196 (Ala.1982), in which the Alabama Court of Criminal Appeals stated, "Appellant made no exception to the trial court's oral charge." Similarly, in Pinkard v. State, 405 So.2d 411, 416 (Ala.Cr.App.1981), the court held, "The law is well settled in Alabama that when a defendant makes no exceptions or objections to the oral charge,

this court cannot review the issue of asserted jury instructions."

[4] The law is identical in Alabama on errors of omission (failure to charge on a necessary point). Such errors are waived unless a proper written requested instruction is tendered to the trial court on the omitted point:

> [w]here a party desires the court to extend its oral charge to cover some applicable law in the trial of a case, his remedy is to request a written charge on the subject, which if refused would protect the record and present the matter for Appellate Courts ...
>
> A failure to pursue ... the [remedy] above set out, if proper and applicable to the case, is a waiver of a review by this court as to the matters in question.

Parham v. City of Opelika, 412 So.2d 1268, 1269 (Ala.Cr.App.1982) (citing Yates v. State, 390 So.2d 32, 35 (Ala.Cr.App.1980)). See also Miller v. State, 405 So.2d 41, 47 (Ala.Cr.App.1981).

Rule 39(k), Alabama Rules of Appellate Procedure provides:

> In all cases in which the death penalty has been imposed, upon review of the opinion of the Court of Criminal Appeals on certiorari, the Supreme Court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the Petitioner.

In Ritter v. State, 375 So.2d 270, 275-76 (Ala.1979), the Alabama Supreme Court refused to apply the plain error rule to alleged defects in the oral jury charge, both as to the charge of accomplice liability, as it related to capital murder, as well as to the robbery charge. The court held, "In the instant case it is abundantly clear that no injury resulted from the trial judge's omission ..." given petitioner's guilty plea which was knowingly and voluntarily entered, and his knowing and voluntary waiver of any errors in the charge. Id. at 276.

[5] A state court's holding that there has been a procedural default is binding upon this Court insofar as the issue of whether a state law procedural default has occurred. Engle v. Isaac, 456 U.S. 107, 134-35 & n. 44, 102 S.Ct. 1558, 1575 & n. 44, 71 L.Ed.2d 783, 804-05 & n. 44 (1982);[14]

Belotti v. Baird, 443 U.S. 622, 644 & n. 24, 99 S.Ct. 3035, 3049 & n. 24, 61 L.Ed. 797, 814 & n. 24 (1979); Mendiola v. Estelle, 635 F.2d 487, 489 (5th Cir.1981).

[6] Engle v. Isaac, supra, and related decisions establish that petitioner's state law procedural default bars him from litigating any jury instruction issues in this Court absent an affirmative showing of both cause and prejudice. Petitioner has the burden of showing both cause and prejudice, e.g., Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir.1983), yet he has failed to prove either. Indeed, as noted above and in the Findings of Fact, the only reason why no objections were made and no written instructions submitted was that he ordered his attorney not to do so. Based upon this uncontradicted testimony, and absent a showing of cause, no amount of prejudice will suffice

to remove a procedural default bar. Engle v. Isaac, supra, 456 U.S. at 134 & n. 43, 102 S.Ct. at 1575 & n. 43, 71 L.Ed.2d at 804 & n. 43. (As for Para. 67 and 68 of the petition, this Court has already held petitioner was not prejudiced by the preclusion clause.)

C. Verdict Form. Claim 3 (Para. 69-73) is a challenge to the verdict form. Code of Alabama, 1975, Section 13-11-2(a) provided that "[i]f the jury finds the Defendant guilty, it shall fix the punishment at death ...." The statute thus on its face possesses the deficiencies of the mandatory death sentence statutes condemned in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976): "Because the jury was given no guidance whatsoever for determining when it should exercise this de facto sentencing power, the mandatory death

sentence statutes raised the same possibility that the death penalty would be imposed in an arbitrary and capricious manner as the statute held invalid in Furman." Beck v. Alabama, supra, 447 U.S. at 640, 100 S.Ct. at 2391, 65 L.Ed.2d at 404. The Court further stated in Beck:

> The Alabama statute which was enacted after Furman but before Woodson has many of the same flaws that made the North Carolina statute unconstitutional. Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue.

Id. The Court appears to have addressed the mandatory sentence portion of the statute and found it invalid:

In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant consideration into the fact finding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the other hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason--its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason —that whatever his crime, the defendant does not deserve death. In any

particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the fact finding process that cannot be tolerated in a capital case.

447 U.S. at 642-43, 100 S.Ct. at 2392, 65 L.Ed.2d at 406. The "but in every case" language in the quotation was limited and explained in Hopper v. Evans, supra.

[7,8] A constitutional error, however, does not merit reversal where the error or defect is harmless beyond a reasonable doubt in view of the facts and circumstances of the case. See, e.g., Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705, 709 (1972). That rule applies in capital cases where the defendant has been sentenced to death. See, e.g., Hopper v.

Evans, supra; McCorquodale v. Balkam, 705 F.2d 1553, 1556 (11th Cir.1983). And the rule applies to errors or defects in the sentencing stage of a capital case. Ford v. Strickland, 696 F.2d 804, 815 (11th Cir. 1983) (en banc) (majority opinion);[15] Proffitt v. Wainwright, 685 F.2d 1227, 1269 (11th Cir.1982).[16]

[9-12] In determining whether a real or assumed constitutional error or defect is harmless beyond a reasonable doubt, a reviewing court must determine "the probable impact" of that error or defect on the decision maker below. Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284, 288 (1969). If, upon review of the entire record, the court determines there is no reasonable possibility that the constitutional error or defect might have contributed to the result,

then it is harmless beyond a reasonable doubt. Harrington v. California, supra; Chapman v. California, supra; Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171, 173 (1963). Where a review of the record leaves a court without a doubt that the same decision would have been reached in the trial court had the error or defect not existed, the error or defect is harmless beyond a reasonable doubt. Milton v. Wainwright, 407 U.S. 371, 372, 377, 92 S.Ct. 2174, 2175, 2177, 33 L.Ed.2d 1, 4, 6 (1972). A reasonable doubt is a reason in the record, see e.g., Johnson v. Louisiana, 406 U.S. 356, 360, 92 S.Ct. 1620, 1623, 32 L.Ed.2d 152, 158 (1972), and not a vague, speculative, or imaginary doubt. See, e.g., United States v. Johnson, 343 F.2d 5, 6 (2d Cir.1965).

[13] The constitutional defect in this instance is clearly harmless beyond a reasonable doubt. This Court has already concluded that petitioner was not entitled to an instruction on a lesser included offense. See Section III A-2, supra. Therefore, the only question confronting the jury was guilt or innocence on the capital murder charge. The verdict form (or mandatory death sentence) would have had no effect on the jury's deliberations, and the constitutional infirmities articulated in Woodson v. North Carolina and Beck v. Alabama, supra, were not present: no uncertainty or unreliability was introduced into the fact finding process by the mandatory death sentence included on the verdict form.

Second, taken alone, given that there was no entitlement to the lesser included offense instruction, and without regard to

Claim 5,[17] the verdict form defect is harmless beyond a reasonable doubt because the jury's "sentence" is merely advisory, and the actual sentence is imposed by the judge whose sentencing decision is constrained by objective standards. Since the actual "sentencing authority" is appropriately guided, the phantom sentence decision by the jury, taken alone, is harmless. See discussion in Section III E, infra. See also a description of the procedures under which petitioner was sentenced in Ritter v. State, supra, 429 So.2d 935-37, and this Court's discussion of those procedures in Evans v. Britton, 472 F.Supp. 707, 717-719 (S.D. Ala.1979.)

Finally, these claims (which also include Claims 4-6) were raised and rejected in Alabama v. Evans, ___ U.S. ____, 103 S.Ct. 1736, 75 L.Ed.2d 806 (1983) (per curiam).

The Supreme Court dismissed these very sentencing procedure claims as having been "conclusively resolved in prior proceedings." Id. 103 S.Ct. at 1739.

[14] D. Jury's Failure to Consider Mitigating Circumstances. Claim 4 (Para. 74-80) is actually composed of parts of Claims 3 (Para. 75-77) and 5 (Para. 78-80). This claim is to the effect that the automatic sentence of death contained in the verdict form is unconstitutional because the members of the jury were unable under the then existing law to consider any mitigating circumstances. Given petitioner's unusual, even self-destructive behavior in front of the jury in which he threatened the jury and admitted his guilt, including making the statement that he would have shot Edward Nassar had not Evans done so, it is inconceivable that a jury would not have

recommended the death penalty. See Findings of Fact, Part II C, supra. Therefore, this Court concludes that this claim is harmless beyond a reasonable doubt. See discussion of constitutional harmless error rule in Section III C, supra.

[15] E. Judge's Consideration of Jury's Automatic Death Sentence. Claim 5 (Para. 81-86) is an attack upon the statutory relationship between the jury and the judge in the sentencing process. Under the statute, as noted supra, the jury in finding guilt, simultaneously imposes a death sentence without any choice as to sentencing and without instruction as to aggravating and mitigating factors. As noted supra, the statute provided that the actual sentencing decision was to be made by the trial judge based upon, among other things, the aggravating and mitigating circumstances set

out in Code of Alabama 1975, Sections 13-11-6 and 7. Section 13-11-4 provides in part:

> Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death.

There is, therefore, an express statutory direction that the court consider the phantom death sentence by the jury in determining to conform to that sentence, and an

arguable requirement (the first phase of the statute being ambiguous in its effect) that the court also weigh the phantom sentence by the jury in a decision to commute the sentence to life without parole.

Petitioner contends first that the jury's death sentence is constitutionally proscribed because it is unguided and standardless, and is made simultaneously with the guilt determination, and second, that since this illegitimate sentence must be accorded weight by the trial judge in the actual sentencing determination, the entire sentencing formula is invalid. Additionally, petitioner contends that the public would perceive a commuting judge as having overridden the sentence determination of the jury, when in reality all the jury determined was guilt. Given that Alabama's Circuit Judges are elected, and that capital murder

proceedings are widely publicized, petitioner argues, the phantom jury sentence places undue pressure on the trial judge to conform the actual sentence to the verdict.

It should be noted that at least to some extent this claimed constitutional defect in the 1975 statute inheres in the judicially-created post-Beck sentencing process and in the present Alabama death penalty statute. Under both schemes, the jury first finds guilt or innocence, without regard to sentence. Then a sentencing hearing, with the jury's decision constrained by statutory factors, is conducted. The trial judge then independently analyzes the statutory factors and either conforms to or overrides the jury's sentence. Even under this scheme, a jury's death sentence arguably pressures the elected judge to conform to it. Presumably the process is made more palatable by the

fact that the jury's sentence is a real, controlled sentencing decision, presumptively having greater reliability than its "sentence" under the 1975 act.

The United States Supreme Court has observed that under the 1975 act "it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did." Beck v. Alabama, 447 U.S. at 645, 100 S.Ct. at 2393, 65 L.Ed.2d at 402. In making that observation the Court noted the comments of Justice Jones in Jacobs v. State, 361 So.2d 607, 650-51 (Ala.Cr.App.1977), regarding the pressures that public scrutiny and the elected nature of the office place on Alabama's Circuit Judges to conform to a jury's death sentence. 447 U.S. at 645 & n. 22, 100 S.Ct. at 2393 & n. 22, 65 L.Ed.2d at 407 & n. 22, (noting "the practical obstacles to

treating the jury's imposition of the death penalty as being purely advisory....")

Petitioner's claim, in the abstract, appears to be substantial. The automatic death penalty, combined with the inclusion of that penalty in the actual sentencing formula and the sentencing judge's position with respect to the public, might in some circumstances prejudice a defendant where the sentencing decision presented a close question. Here, the State argues, the problem was, beyond a reasonable doubt, not prejudicial to this petitioner; and this Court agrees.

Petitioner was tried and sentenced by the highly distinguished presiding Judge of the Circuit Court. That Judge is now deceased. Even were he alive, he could not, under the law of this Circuit, testify regarding the weight, if any, the jury's sentence played

in his sentencing determination. Washington v. Strickland, 693 F.2d 1243, 1263 (11th Cir. 1982) (en banc). In his sentencing opinion, which did not include the jury verdict in his sentencing formula, the Circuit Judge, upon consideration of the statutory aggravating and mitigating circumstances, concluded:

> The court, having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances; it is the judgment of the court that the aggravating far outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted.

Exhibit 1, 246. Though the Court "accepted" the jury penalty, the statement establishes that it did so upon an independent weighing

of the aggravating and mitigating circumstances and that that weighing process did not include the jury's recommendation. Having considered the record in this case, including the Judge's sentencing pronouncement, the total absence of any record evidence that the sentencing Judge was improperly affected by the jury verdict or public pressure, and this Court's knowledge of the sentencing Judge's tenure of office, position with the state court, and esteem in the community (legal and general), the Court finds that the statute, as applied in this particular case, did not prejudice petitioner's rights, and concludes that, beyond a reasonable doubt, his rights were not so prejudiced. (See discussion of the application of the constitutional harmless error rule, Section III C, supra.)

[16] F. Cumulative Impact of Sentencing Procedures. Petitioner's Claim 6 (Para. 87) relates to the cumulative impact of the alleged unconstitutional sentencing procedures. In proceedings under 28 U.S.C. § 2254, the petitioner must plead and prove prejudice from any averred constitutional errors or defects in his state court trial. See, e.g., Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736-37, 52 L.Ed.2d 203, 212 (1978). Federal habeas relief should be limited to cases involving "fundamental miscarriages of justice," Engle v. Isaac, supra, 456 U.S. at 135, 102 S.Ct. at 1575, 71 L.Ed.2d at 705 (1982); United States v. Frady, 456 U.S. 152, 172, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 833 (1982).

In the case at bar, given petitioner's behavior at trial (See Findings of Fact at II C), and that the defects alleged were

harmless beyond a reasonable doubt (See Conclusions of Law at III C, D and E), the Court concludes that the defects alleged in Claims 3-5, either singly or in combination, created no fundamental miscarriage of justice. And the Court so concludes beyond a reasonable doubt. (See discussion of constitutional harmless error rule in Conclusions of Law at III C.)

[17] G. Jury Input. Petitioner's Claim 7 (Para. 88-90) is that the act under which he was sentenced to death is unconstitutional because it did not provide for actual jury input into the sentencing process. There is no constitutional basis for this claim. In Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913, 923 (1976), the United States Supreme Court stated:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, ... but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. [citations omitted]

Nor has it ever been held that jury input into a capital punishment case is constitutionally required. See, e.g., Drake v. Zant, 449 U.S. 999, 101 S.Ct. 541, 66 L. Ed.2d 297 (1981) (White, J., dissenting from denial of certiorari); Richmond v. Arizona,

434 U.S. 1323, 1325, 98 S.Ct. 8, 9, 54 L.Ed.2d 34, 36-47 (1977) (denial of stay by Rehnquist, J., as Circuit Justice); State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977); Jacobs v. State, 361 So.2d 640, 646 (1978) (separate opinion of Torbert, C.J.).

[18] H. The Third Aggravating Circumstance. Petitioner's Claim 8 (Para. 91-97) relates to Code of Alabama, 1975, Sections 13-11-3 and 13-11-6. Section 13-11-3 provides for a sentencing hearing, and states in pertinent part that upon a finding of guilt in a capital offense,

> ... the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing,

> evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7 ....

Section 13-11-6 contains eight aggravating circumstances, one of which provides: "(3) The defendant knowingly created a great risk of death to many persons ...."

Following petitioner's conviction of capital murder, the state trial court held the required evidentiary hearing and entered written findings in which he found four aggravating circumstances and two mitigating circumstances. (Exhibit 1, 30-33.) One of the aggravating circumstances found by the trial court in addressing Section 13-11-6(3) was, "(c) The Court finds that Mr. Ritter has knowingly on approximately thirty-nine

previous occasions created a great risk of death to many persons." Id. at 30. Thus, the trial court in finding the presence of the third aggravating circumstance, addressed not only the crime for which petitioner was convicted, but his crime spree during the several months prior to and following the murder of Edward Nassar.

Petitioner contends that the consideration of events other than the crime spree itself in applying this factor is erroneous as a matter of statutory construction and therefore introduces into the sentencing formula factors not specifically provided for in the statute. See Goode v. Wainwright, 704 F.2d 593 (11th Cir.1983); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir.1982); Henry v. Wainwright, 661 F.2d 56 (5th Cir.1981), reinstated, 686 F.2d 311 (5th Cir.1982).

The Alabama courts have not articulated the precise extent of permissible consideration as it applies to Section 13-11-6(3).[18] In Evans and Ritter v. State, 361 So.2d 654, 662 (Ala.Crim.App.1977), however, the Alabama Court of Criminal Appeals stated:

> The aggravating circumstances were here averred and proved at trial, and also determined by the trial judge in a public hearing, as required by law.
>
> In addition, this Court has weighed the aggravating and mitigating circumstances independently.
>
> As stated by Harris, J. in [Jacobs v. State, 361 So.2d 607 (1977)]:
>
> 'The aggravating circumstances found by the trial court are amply supported by the evidence in this case. The verdict of the jury is overwhelmingly

sustained by a preponderance of the evidence.'

Thus, the Court of Criminal Appeals, although it did not specifically discuss the statutory scope of Section 13-11-6(3), did hold that under Alabama law the trial court in the petitioner's case had correctly performed its duties in finding and weighing the aggravating and mitigating circumstances. The Court of Criminal Appeals also went on to independently consider the aggravating and mitigating circumstances and arrived at the same conclusion as the trial court.[19]

This identical claim was presented by petitioner's co-defendant, John Louis Evans, to the United States Supreme Court in Alabama v. Evans, ___ U.S. ___, 103 S.Ct. 1736, 75 L.Ed.2d 806 (1983). The Supreme Court in considering Evans' claim stated:

Proffitt, however, does not address the question whether this particular aggravating factor may be applied to acts unrelated to the capital offense itself. The decision in that case only applies the principal established in Godfrey v. Georgia, 446 U.S. 420, 120 S.Ct. 1759, 64 L.Ed.2d 398 (1980), that aggravating factors must be construed and applied in a nonarbitrary manner. On the facts of respondent's case, there was no violation of the Godfrey principle in finding this particular aggravating circumstance. Nor is there any question that application of this aggravating factor was proper under the Alabama statute as construed by the Alabama courts.

. . . . .

... This new claim, challenging the validity of one of the aggravating

circumstances found to exist in this case, is a question of law as to which no further hearing is required. For the reasons stated above, we conclude that the claim is without merit.

Id. 103 S.Ct. at 1738. While the procedural impact of that opinion might be subject to some question, given its emergency nature, this Court considers that opinion to be a decision on the merits foreclosing review in this Court. C.f. also Barclay v. Florida, ___ U.S. ____, 103 S.Ct. 3418, 76 L.Ed.2d ____ (1983).

[19] I. Disproportionate Sentence. Claim 9 (Para. 97-104) relates to the severity of petitioner's sentence with respect to the crime. This is not a challenge to any proportionality review aspect of the sentencing statute, see generally, Harris v. Pulley, 692 F.2d 1189 (9th Cir.1982), cert.

granted, ___ U.S. ____, 103 S.Ct. 1425, 75 L.Ed.2d 787 (1983), but is instead a claim that petitioner's sentence of death was excessive in view of the fact that he was not the triggerman and, as petitioner now claims, he did not intend the death of Edward Nassar.

In Enmund v. Florida, ___ U.S. ____, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982); the United States Supreme Court held that it is unconstitutional to impose the death penalty where defendant "neither took life, attempted to take life nor intended to take life." In determining whether a defendant may constitutionally be sentenced to death, "the focus must be on his culpability, not on those who [killed the victim], for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id., ___ U.S. at ____,

102 S.Ct. at 3377, 73 L.Ed.2d at 1152 (1982), (quoting Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978)) (emphasis in the original). Thus in determining whether to sentence a defendant to death, the focus is upon the defendant's intent, and more specifically, whether the defendant killed, attempted to kill, or had in some other fashion the constitutionally required intent to kill.

The Alabama Courts, both at the trial level and on appeal, have found that petitioner had the requisite intent to kill: petitioner was an accomplice to the intentional killing of Edward Nassar; he had previously agreed with Evans to kill anyone who attempted to go for a gun during one of those robberies; petitioner encouraged and supported the killing and was present with Evans' knowledge to render assistance should

it have been necessary; petitioner would have killed Edward Nassar himself had Evans not been in his line of fire; and petitioner had the particularized intent to kill. (Findings of Fact 35-49). These Findings, which provide the basis for petitioner's death sentence, comport with the constitutionally required individualized inquiry into petitioner's intent as established in Enmund, supra.

Where such findings are fairly supported by the state court record, they are presumptively correct, and binding upon a federal habeas proceeding unless the petitioner can prove otherwise. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). Based upon this Court's review of the state court record and the testimony and evidence at the evidentiary hearing, this Court has found that "a trier

of fact could conclude beyond a reasonable doubt that Defendant ..." possessed the required intent to kill. Stanley v. Zant, 697 F.2d 955, 973 (11th Cir.1983). Accordingly, under 28 U.S.C. § 2254(d) and Sumner, supra, this Court is bound by the Alabama state court findings as to petitioner's intent, and concludes that petitioner's sentence of death was not disproportionate.

Petitioner did testify at his evidentiary hearing that he did not intend the death of Edward Nassar; however, that testimony was contradicted by a number of other witnesses. Credibility is with the trier of fact, and in a habeas proceeding the district court is not required to accept self-serving testimony by the petitioner, even if it is uncontradicted; e.g., Hawk v. Olsen, 326 U.S. 271, 279, 66 S.Ct. 116, 120, 90 L.Ed. 61 (1945); Burston v. Caldwell, 506 F.2d 24,

26 (5th Cir.1975); Tyler v. Beto, 391 F.2d 993, 995 (5th Cir.1968); and a district court can, as here, certainly reject a habeas petitioner's testimony when it is contradicted by other witnesses or by state court record, e.g., Burston v. Caldwell, supra; Dempsey v. Wainwright, 471 F.2d 604, 607 (5th Cir.1973); Walker v. Beto, 387 F.2d 626, 627 (5th Cir.1967). In resolving the discrepancy between the testimony of the petitioner and other witnesses at the hearing, this Court has for reasons articulated in this Court's Findings of Fact found independently of and in addition to findings made by the Alabama state courts that petitioner did indeed have the requisite intent to kill. Thus, based upon that finding of fact, this Court concludes, as a second and independent basis, that petitioner's

sentence of death was not disproportionate and was therefore not unconstitutional.[20]

[20] J. Death by Electrocution and the Eighth Amendment. Petitioner's Claim 10 (Para. 105-112) alleges that death by electrocution as administered in the State of Alabama is unconstitutional because it violates the Eighth Amendment's Cruel and Unusual Punishment Clause. That claim was dismissed on June 1, 1983 under Rule 41(b) of the Federal Rules of Civil Procedure following petitioner's presentation of evidence for reasons stated on the record.[21] A certified copy of a transcript of the decisional portion of the record is attached hereto as Appendix for the convenience of the parties and the appellate courts.

IV. CONCLUSION

For the reasons stated in the above Findings of Fact and Conclusions of Law this

Court will by separate document enter judgment against the petitioner, Wayne Eugene Ritter, denying all requested relief and dismissing the petition with prejudice. The Court will also dissolve the stay of execution entered on May 6, 1983.

APPENDIX

JUDGE POINTER: In case 83-1080, Raines v. Smith, Et Al., I am at this time under Rule 41 going to dismiss this particular claim at the conclusion of the evidence presented by the petitioner.

I am going to at this time enter certain findings of fact and certain findings of law with respect to this claim.

As counsel are aware, of course there are 11 other grounds being asserted in support of the motion, but on this particular ground I find the evidence being presented to clearly indicate that the petitioners are

due to lose on this particular issue. In this particular claim the petitioners assert that the infliction in the State of Alabama of electrocution as a means and method for execution constitutes a cruel and unusual punishment contrary to the Eighth Amendment.

Three separate types of claims or theories are presented. First it is claimed that at least in Alabama, given the nature of the equipment, the procedures used, that there is an unnecessary and wanton infliction of pain and suffering. Second it is claimed that the equipment and method involves an unreliable method of execution. Third it is asserted that it involves in its method and equipment a mutilation of the body which would be viewed as contrary and violative of the Eighth Amendment.

The facts however, as I view them, presented in this case are clear and without contradiction on certain points essentially.

First it is clear that properly done the use of the electric chair in Alabama and more particularly in the recent electrocution involved an instantaneous blocking of any sensory perceptions or instantaneously rendering the person unconscious so that he was unable to feel any pain even the immediate pain that presumably would be attendant to the electrocution of self. The evidence as I view it is uncontradicted that this so. It is not only that that is true if it is done correctly and properly but even in the situation of the most recent electrocution where there is a claim that there was some malfunction, the testimony still is that there was no sensation of pain felt by the person being executed.

This means, as I view it, that there is no wanton infliction of pain. Indeed, to the contrary. There is no indication of any pain whatsoever being suffered. There is testimony in this case that at some point based upon the fact that some of this equipment is old, that perhaps there are schematic diagrams that are missing, perhaps a lack of full understanding and comprehension as to the internal workings of the system and that this may fail at some point in the future in performing its assigned task of death. It was averred to in the testimony of the last witness which the witness agreed with that apparently some 154 times over a period of 50 years this chair, however, that is in question now, has been used apparently without any failure of its performing the function of execution. On the particular occasion, Mr. Evans' execution back

in April of this year, the testimony reflects that there were three separate jolts of electricity or bursts of electricity, each approximately for 30 seconds in duration, that were involved in and about his execution. The total period of time involved was from the start at 8:30 until the completion and certificate of death approximately 8:44, I believe it was, about 14 minutes.

The testimony is that Mr. Evans would not have felt anything from the second and third jolts and indeed felt nothing from the first, there having been an instantaneous rendering of him unconscious.

It is possible that this chair may not work in the future. That, however, does not render its use an unconstitutional punishment. Indeed, the Supreme Court in the case of Francis v. Resweber indicated in a case

that even where an electrical malfunction occurred and a person had to be put back to the chair a second time at a later date, that that was not an unconstitutional punishment. The fact that this one may at some point fail materially falls within the doctrine of that case.

It should be noted that as the witness who was last on the stand testified giving some of the history of the electric chair, the Supreme Court and perhaps the same individual who was first electrocuted, Kemmler, in about 1890 ruled in the case of In Re Kemmler that that was not a cruel and unusual punishment and indeed was constitutional.

The only thing unusual really in this case that is being presented is the fact that there were three separate jolts of electricity or periods of current that after

the first two there was an indication of a heartbeat, the first, after the first it was indicated that there was a steady and constant heartbeat. After the second jolt there was an indication of a weak, faint, but nevertheless steady heartbeat. However, again we go back to the point that there was no indiction that there was any involved in this process and indeed the witness who testified testified that death would have been forthcoming, although on a longer period of time if the additional jolts had not been given.

There is one additional situation that is involved here and that is that the evidence reflects that the connectors in terms of the electrodes at the head and the leg were not sufficiently secure and close to the body so as to prevent arcing and burning in the process and Mr. Evans' body did reflect, as

witnesses have testified here, that there was that burning and arcing that occurred during this process, although he was not aware of it and would not have felt it which eneded up or resulted in third and fourth degree burns to his head and to his one leg and ankle.

This appears that [1] to have been accidental and unplanned and no indication that this ever occurred at any prior time in the use of this chair. Here again, if one goes to the case of Francis v. Resweber, this would indicate that such an accidental malfunction does not render the type of electrocution as unconstitutional.

Secondly, assuming, although the law is not clear that there would be limits of mutilation of the body that might ultimately offend the Eighth Amendment, the degree of extent of the burns in this case does not in

my judgment rise to the point of that kind of offensive mutilation of the body. At least in a situation where there is no indication of any perception of pain by the person and, here again, we come back that he would not have felt any of that.

The conclusion I reach is that under none of the theories presented when the Court looks at the evidence, can it be said that this use by the State of Alabama of this method of electrocution is unconstitutional in and about and relating to the manner or performance, the nature of the equipment and the like.

I do recognize that in the Raines case there are other attacks made in connection with the death penalty itself, but insofar as the selection or use of this electric chair, I am ruling in favor of the

defendants and dismissing what I believe is Claim 5, I believe, in the Raines case.

And the clerk serving for clerk of both of the courts will make that notation and that will be the ruling of the Court in 83-1080.

JUDGE HAND: In 83-0457-H, Wayne Ritter, Petitioner v Fred Smith, Commissioner, Et Al., the Court will adopt the opinion expressed by Judge Pointer in the Raines case as being applicable in its totality to the situation as it fits in the Ritter case and will make a same and similar ruling on that issue as advanced by the petitioner.

We will recess this hearing until tomorrow morning when we will take up the balance of the issues raised in the Ritter case for which a hearing is scheduled.

JUDGE POINTER: And in the Raines case, as counsel are aware, I have set, subject to

possible revision, June 27 for the hearing on the other issues in that case.

JUDGE HAND: 9:00 o'clock in the morning, gentlemen.

(Hearing concluded]

[Footnotes begin on next page.]

[1]For a procedural history of this case see Ritter v. State, 429 So.2d 928, 929-932 (Ala.1983).

[2]Petitioner testified at the evidentiary hearing that he was not certain as to when he first found out about the preclusion clause, but that he probably did not hear of it until after arriving in Alabama. Petitioner's trial lawyer does not remember discussing the preclusion clause with petitioner. (Testimony of Attorney Stephens at hearing.) It appears as though petitioner may have learned about the preclusion clause and other aspects of Alabama capital punishment law from the Mobile District Attorney. (Exhibit 1, 331). That would have been after he waived extradition, and after he made his statements to the FBI and the Mobile Police Department indicating his decision to seek the death penalty.

[3]See footnote 2, supra.

[4]Dr. Brown, a psychiatrist, examined petitioner pursuant to an order of the state trial court dated April 18, 1977. He found petitioner was sincere in seeking the death penalty. He testified on June 1, 1983 at the evidentiary hearing on both the issue of electrocution as cruel and unusual punishment and as to petitioner's state of mind as it related to his trial strategy.

[5]Substantial portions of the trial were televised pursuant to Alabama law and stipulations entered into by the defendants and the prosecutor. (Exhibit 1 at 92-93, 254-257.) Petitioner's testimony was highly inflammatory and obviously calculated to arouse the jury into convicting him. For the full flavor of his testimony see Exhibit 1, 216-221 and Exhibit 2. Portions of petitioner's testimony are more fully excerpted in these Findings, infra, Part E.

[6]See discussion of the constitutional harmless error rule, Section III C, infra.

[7]See, e.g., "Every accused is entitled to have charges given which would not be misleading, which would correctly state the law of his case and which are supported by any evidence, however weak, insufficient or doubtful in credibility." Chavers v. State, 361 So.2d 1106, 1107 (Ala.1981); and Fulghum v. State, 277 So.2d 886, 890 (1973).

[8]Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

[9]This case differs from Beck in that Ritter, until the evidentiary hearing, never denied that he intended Edward Nassar's death, indeed, his testimony was exactly the opposite. Intent was never an issue at Ritter's trial. See Beck, 447 U.S. at 629, 100 S.Ct. at 2386, 65 L.Ed.2d at 398.

[10]See footnote, 7, supra.

[11]See Ritter v. State, 375 So.2d 266 (Ala.Cr.App.1978), in which the Court of Criminal Appeals held Ritter could be convicted under the theory of accomplice liability. See also Findings of Fact 46 and 47, supra.

[12]And as the Alabama Supreme Court noted in Ex Parte Ritter, there was also evidence at the trial that Ritter had the particularized intent to kill. Ex Parte Ritter, 375 So.2d at 274.

[13]Although petitioner does not specifically raise the issue, the Court concludes for the same reasons that Ritter was not entitled to be indicted on some lesser charge. Petitioner, following discussions with the Mobile District Attorney, decided voluntarily and knowingly to testify in front of the Grand Jury. Exhibit 1, 338-347. It had been explained to him by the District Attorney that he had the right to a jury, that he did not have to testify, that the burden of proof was on the state. Id. at 345. Petitioner's only complaint was that the process was taking too long. Id.

Petitioner did not have to testify in front of the Grand Jury; and certainly if he never intended the death of Edward Nassar, or had not made an agreement with John Evans to support his actions during the commission

of a crime, including murder, if necessary, he could so have testified. Under that evidence, he might well have received an indictment on some lesser included offense. Instead he admitted the elements of accomplice liability, and demanded the death penalty. On these facts, where petitioner by his own testimony and guilty plea negated the possibility of an indictment on a lesser charge, the Court concludes that beyond a reasonable doubt petitioner was not prejudiced by the "preclusion clause" as it related to the charge under which he was indicted. Beck v. Alabama was limited by Hopper v. Evans, supra. See also the discussion of the constitutional harmless error rule at Section III C, infra.

[14]In fcotnote 44, Justice O'Connor states, "...[w]e should not rely upon a state plain-error rule when the State has refused to apply that rule to the very sort of claim at issue."

[15]The Eleventh Circuit held that where there was insufficient evidence to support some of the aggravating circumstances found by the trial court, the same result would have been reached even if the impermissible aggravating circumstances had not been considered. And Judge Godbold joined by Judge Black in a special concurrence held, "as a matter of general constitutional policy I think it essential that appellate courts be able to employ a harmless error rule where the initial sentence has found

aggravating circumstances to outweigh mitigating circumstances by such a definitive margin." Id. at 822-823.

[16]"Where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result" a death sentence may be affirmed despite constitutional defects.

[17]See Section III E, infra.

[18]On June 13, 1983, petitioner filed a motion with this Court requesting that it certify a question to the Alabama Supreme Court. The proposed question is whether Section 13-11-6(3) applies "to conduct of the defendant which is unrelated to the capital felony for which he is being sentenced." For the reasons discussed in this section, this Court believes that question has been answered, and petitioner's motion will be denied.

[19]The Alabama appellate courts have unwaiveringly held that erroneous consideration of an aggravating circumstance vitiates a death sentence regardless of the number of other aggravating circumstances properly found and considered by sentencing judge. See, Ex Parte Bracewell, 407 So.2d 845, 847 (Ala.1979); Ex Parte Johnson, 399 So.2d 873, 874 (Ala.1979); Cornelius Singleton v.

State, ___ So.2d ____ No. 1 Div. 361 (Ala. Cr.App.Feb. 1, 1983) manuscript op. at 11-12; Morrison v. State, 398 So.2d 730, 748 (Ala.Cr.App.1979). It would therefore appear that had the Alabama appellate courts concluded that the third aggravating factor had been improperly applied in this case, they would have done as in all prior cases in which an aggravating circumstance was erroneously found by the trial court and remanded for a new sentence hearing.

[20]The Court is aware of the statistics regarding the imposition of the death penalty on non-triggerman accomplices, see Enmund v. Florida and Lockett v. Ohio, supra, as well as decisions of Alabama courts in reducing death sentences imposed by juries on accomplices. It is clear such penalties are only infrequently imposed upon non-killers. This case, however, is an unusual one. The trial court judge, based upon the evidence, found that petitioner's conduct was only fortuitously distinguishable from that of his co-defendant, John Evans, who has been executed. As this Court noted in its Finding of Fact 4°, petitioner was not so much a non-triggerman, but was rather an unneeded triggerman. Under these circumstances, petitioner's sentence of death, although statistically unusual, is not disproportionate.

[21]The hearing on June 1, 1983 was a joint hearing with Raines v. Smith, et al., Case No. CV 83-P-1080-S, which is venued in the

United States District Court for the Northern District of Alabama, the Hon. Sam C. Pointer, presiding. Judge Pointer announced the decision which was concurred in and adopted by this Court.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-7486

D.C. Docket No. 83-0457-H

WAYNE E. RITTER,

Petitioner-Appellant,

versus

FRED SMITH, Commissioner, Alabama Department of Corrections; and
J. D. WHITE, Warden, Holman Unit,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

---

Before JOHNSON and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United

States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED in part and REVERSED in part; and that this cause be and the same is hereby, REMANDED to said District Court with instructions to issue a writ of habeas corpus if the State of Alabama does not afford petitioner-appellant a new sentencing hearing.

Entered: February 27, 1984

For the Court: Spencer D. Mercer,
Clerk

By: /s/ Miguel Cortez
Deputy Clerk

ISSUED AS MANDATE:

APPENDIX D

Wayne E. RITTER, Petitioner-Appellant,

v.

Fred SMITH, Commissioner, Alabama Department of Corrections, and J.D. White, Warden, Holman Unit, Respondents-Appellees.

No. 83-7486.

United States Court of Appeals, Eleventh Circuit.

April 9, 1984.

Appeal from the United States District Court for the Southern District of Alabama.

ON PETITION FOR REHEARING

(Opinion February 27, 1984, 11 Cir., 1984, 726 F.2d 1505).

Before JOHNSON and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

GRANTED to the extent that the sentence on page eight (8) of this Court's manuscript opinion, "The State does not address the merits of petitioner's constitutional challenge to the sentencing procedures," is changed by this Court to read "The State does not address the merits of petitioner's constitutional challenge to the sentencing procedures except by citation to the opinion of the Alabama Supreme Court in Ritter v. State, 429 So.2d 928, 934-37 (1983)."

Except for this change in this sentence on page eight (8) of this Court's manuscript opinion, this manuscript opinion in all other respects remains as originally filed.

APPENDIX E

TITLE 28, UNITED STATES CODE, SECTION 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process

ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by an available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed

to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint

counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court,

when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to

a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

APPENDIX F

CODE OF ALABAMA 1975

§ 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

§ 13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of

age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against

any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the

punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to

have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without

parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

§ 13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of,

or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

§ 13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No.213, § 10.)

Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1875

In The
Supreme Court of the United States
October Term, 1983

FRED SMITH, Commissioner, Alabama Department of Corrections, and W. E. JOHNSON, Warden, Holman Unit,

Petitioners,

vs.

WAYNE EUGENE RITTER,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATE OF NORTH CAROLINA AND THE COMMONWEALTHS AND STATES OF ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

RUFUS L. EDMISTEN
Attorney General of North Carolina

JOAN HERRE BYERS*
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Attorneys for Amici Curiae
*Counsel of Record

(Additional Counsel listed on inside cover.)

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

Robert K. Corbin
Attorney General of Arizona

John Steven Clark
Attorney General of Arkansas

John Van de Kamp
Attorney General of California

Duane Woodard
Attorney General of Colorado

Joseph Lieberman
Attorney General of Connecticut

Charles M. Oberly, III
Attorney General of Delaware

Jim Smith
Attorney General of Florida

Michael J. Bowers
Attorney General of Georgia

Jim Jones
Attorney General of Idaho

Neil F. Hartigan
Attorney General of Illinois

Linley E. Pearson
Attorney General of Indiana

David L. Armstrong
Attorney General of Kentucky

William J. Guste, Jr.
Attorney General of Louisiana

Edwin L. Pittman
Attorney General of Mississippi

John Ashcroft
Attorney General of Missouri

Michael T. Greely
Attorney General of Montana

Paul L. Douglas
Attorney General of Nebraska

Brian McKay
Attorney General of Nevada

Paul Bardacke
Attorney General of New Mexico

Anthony J. Celebrezze, Jr.
Attorney General of Ohio

Michael C. Turpen
Attorney General of Oklahoma

LeRoy S. Zimmerman
Attorney General of Pennsylvania

T. Travis Medlock
Attorney General of South Carolina

Mark V. Meierhenry
Attorney General of South Dakota

William M. Leech, Jr.
Attorney General of Tennessee

Jim Mattox
Attorney General of Texas

David L. Wilkinson
Attorney General of Utah

Gerald L. Baliles
Attorney General of Virginia

Kenneth O. Eikenberry
Attorney General of Washington

Archie G. McClintock
Attorney General of Wyoming

QUESTIONS PRESENTED

1. Did the court of appeals err in expanding federal habeas review to encompass facial attacks on state statutes, so that one to whom a statute is constitutional as applied may have his conviction or sentence set aside based upon how the statute might operate in some other case?

2. Did the court of appeals err in holding that *Zant v. Stephens,* 103 S.Ct. 2733 (1983), and *Lockett v. Ohio,* 438 U.S. 586 (1978), absolutely bar application of the harmless error rule to certain types of sentencing defects in capital cases regardless of the facts and circumstances?

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Rule 36.4, Supreme Court Rules 1

No. 83-1875

In The

Supreme Court of the United States

October Term, 1983

FRED SMITH, Commissioner, Alabama Department of Corrections, and W. E. JOHNSON, Warden, Holman Unit,

Petitioners,

vs.

WAYNE EUGENE RITTER,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATE OF NORTH CAROLINA AND THE COMMONWEALTHS AND STATES OF ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The states listed above, by and through their respective Attorneys General, appear on behalf of their citizens, and pursuant to Rule 36.4 file this amici curiae brief in support of the granting of certiorari to review the first two questions presented by the certiorari petition.

INTEREST OF AMICI CURIAE

We 31 amici curiae states all have capital punishment statutes. Collectively, our states have 1,332 death row inmates, or over 98 percent of the total death row population in this country.[1] We are vitally concerned with any decision which restricts the applicability of the harmless error rule at the sentencing stage of a capital case, because such a decision threatens our ability effectively to advance the important state interests behind our capital punishment statutes. We need and seek a decision from this Court which will unify and reconcile the decisions concerning the nature and scope of the harmless error rule as it applies to the sentencing stage of a capital case.

In addition, we amici curiae states come from ten of the eleven federal judicial circuits.[2] We have a vital interest in any decision which expands a federal court's power to review a state court judgment in a 28 U.S.C. §2254 proceeding. Such a decision undermines our important interests in the finality of the judgments of our state courts, and it denigrates our authority to administer our criminal justice systems unhindered by federal court power that is not authorized by congressional enactment or by decision of this Court.

---

[1]These figures, which include the death row inmates of Alabama, the state which filed the certiorari petition, are drawn from the NAACP Legal Defense and Educational Fund's "Death Row, U.S.A." report for May, 1984.

[2]Only the First Judicial Circuit not represented. The states comprising that circuit (4) have no inmates under a sentence of death.

The States of Florida and Georgia directly share with Alabama the burden of the decision below, because it is now the law of the Eleventh Circuit. The interests of the other amici curiae states are also affected by the decision, because defendants will cite it in other federal circuits and attempt to have the other courts of appeal adopt it.

SUMMARY OF ARGUMENT

Certiorari should be granted to review two of the questions presented in the petition. The first involves the holding of the Eleventh Circuit Court of Appeals that facial attacks on state statutes are cognizable in 28 U.S.C. §2254 proceedings, so that one to whom a state statute has been constitutionally applied may have the judgment in his case set aside based on the effect the statute may have had on a defendant in some other case. That unprecedented holding is contrary to the clear language of §2254, and it conflicts with decisions of this Court on standing.

The question presented is important because it involves the scope of review in the approximately eight thousand state prisoner habeas petitions that are filed in federal court each year. It is also important because of the nature of the interests involved. This Court in recent years has identified the traditional narrow limits of the writ of habeas corpus, because overextension of the writ entails heavy costs to our system of justice and to important principles of federalism. The decision of the court below expands significantly the scope of the writ, enlarges the costs imposed on the criminal justice system and jeopardizes sensitive federal-state relations.

Certiorari should also be granted to review the second question presented, which involves the applicability of the harmless error rule to the sentencing stage of a capital case. The holding of the federal appeals court carving out a broad category of sentence stage errors to which the harmless error rule may not be applied is of national importance. There are more than 1300 cases involving a sentence of death at the post-conviction stage in state or federal court, and because of the complexity and the fluidity of the constitutional doctrines applicable to capital sentencing, harmless error questions will arise in a significant number of cases.

The nature and extent of the harmless error rule's application to the sentencing stage of capital cases is also important because of the constitutional imperative that the death penalty be applied in a non-arbitrary and non-capricious fashion. Full application of the harmless error rule to capital sentencing defects or errors is necessary to minimize the danger of capricious results caused by death sentences being overturned even when there is no reason to doubt that these sentences are proper.

The holding below that a defendant can gain a reversal of his sentence because of an error or defect which is proven beyond a reasonable doubt to be harmless, is inconsistent with this Court's holding in *Strickland v. Washington*, 52 U.S.L.W. 4565 (1984), which requires a defendant to show prejudice from an attorney deficiency error at the sentence stage of a capital case. At the very least, there is enough apparent inconsistency between *Strickland* and the holding below that certiorari should be granted to review and reconcile the decisions concerning the requirement of prejudice and the harmless error rule in capital

sentencing. The states and the lower courts need guidance on this area of the law, and because the extreme facts of this case illuminate the issues well, it provides an ideal opportunity for this Court to provide such guidence.

ARGUMENT

I. Certiorari Should Be Granted To Review The Holding That Federal Habeas Corpus Review Extends To Facial Attacks On State Statutes.

In this case, a federal appeals court has held that facial attacks on state statutes are cognizable in 28 U.S.C. §2254 proceedings, so that a state prisoner to whom a statute is constitutional as applied may obtain federal habeas relief based upon how the statute might have affected some other prisoner in an unrelated case. *Ritter v. Smith,* 726 F.2d 1505, 1516-1517 & n. 24 (11th Cir. 1984) (Pet. App. 38a-39a, 58a). As the authorities discussed on pp. 35-42 of the certiorari petition establish, the holding below is an unprecedented and alarming expansion of federal court power to review collaterally state court criminal judgments.

28 U.S.C. §2254(a), as written by Congress, provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only on the ground that he* is in custody in violation of the Constitution or laws or treaties of the United States.

(emphasis added). That statutory language clearly expresses the Congressional intent to restrict issuance of the writ to cases in which the habeas petitioner himself is in custody in violation of the Constitution. The statute does not permit, and indeed forbids, issuance of the writ where the state statute in question was constitutionally applied to the habeas petitioner before the court. Such a habeas petitioner is not himself "in custody in violation of the Constitution."

In this case, the district court found that the capital punishment statute was constitutional as applied to this habeas petitioner, *Ritter v. Smith*, 568 F.Supp. 1499, 1521-1522 (S.D. Ala. 1983) (Pet.App. 157a-158a), because the alleged defect could not conceivably have affected him in view of the extraordinary facts and circumstances in his case, *id.*, at 1508-09, 1521-22 (Pet.App. 94a-96a, 157a-158a). Without disturbing that conclusion or the factfindings on which it was based, the appeals court nonetheless ordered the writ granted because the statutory defect might have affected some other state inmate who, unlike this one, was involved in "a close case." *Ritter v. Smith*, 726 F.2d at 1516 n. 24 (Pet.App. 58a).

The Court below has, in effect, amended 28 U.S.C. §2254(a) so that it now reads:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he, *or some other inmate tried under the same statute,* is in custody in violation of the Constitution or laws or treaties of the United States.

(italicized words added). The Court below has converted the federal habeas corpus statute into a declaratory judgment statute. Under its decision, the restrictions on standing to litigate the rights and interests of others, which have heretofore applied generally, *e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *United States v. Raines*, 362 U.S. 17, 21 (1960), will no longer apply to habeas corpus petitioners.

Ironically, in an area where this Court has labored in recent years to minimize state-federal friction, *see, e.g., Engle v. Isaac*, 456 U.S. 107 (1982); *Rose v. Lundy*, 455 U.S. 509 (1982); *Stone v. Powell*, 428 U.S. 465 (1976), the Eleventh Circuit Court of Appeals has, by its expansive interpretation of its power in the context of a habeas corpus proceeding, created a new area of tension which seriously undermines the concept of federalism embodied in this Court's decisions in *Engle, Rose,* and *Stone*. Under the decision below, state statutes can be reviewed on their face at the behest of anyone convicted under them, and otherwise valid state court judgments can be set aside by a federal court because of what may have occurred or even simply theoretically might occur in a different case.

This question presented is one of national importance. There were over eight thousand habeas petitions filed by state prisoners in the federal district courts in the last year for which data is available, and the number of such petitioners has been increasing in recent years.[3] The

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[3]Department of Justice, Bureau of Justice Statistics, *Habeas Corpus: Federal Review of State Prisoner Petitions* (released May 1984), at 3. The latest year for which data is available is 1982, when 8,059 habeas petitions were filed in federal court by state prisoners. That number is an all-time high, and it represents a fourteen percent increase over 1980.

proper scope of review in such proceedings is a question which affects a significant number of cases, and it also affects important interests.

The interests affected are important, because "the Great Writ entails significant costs," *Engle v. Isaac,* 456 U.S. 107, 126 (1982), and those costs are multiplied whenever the writ is extended beyond its proper scope. This Court noted in *Engle* that, "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused." *Id.,* at 126-27. Such review also undermines legitimate interests in the finality of litigation and thereby frustrates the goal of deterrence and any prospects of rehabiliation. *Id.,* at 127 & n. 32. This Court noted that, "[l]iberal allowance of the writ, moreover, denigrates the prominence of the trial itself," and may thereby actually diminish the sanctity of safeguards intended to protect the accused. *Id.,* at 127.

This Court also acknowledged in *Engle* that, "writs of habeas corpus frequently cost society the right to punish admitted offenders," because of the difficulties of retrying a case long after the crime was committed. *Id.,* at 127-128. All of these costs affect and concern us, the amici states. However, the greatest cost the writ entails for us was summarized by this Court in *Engle* as follows:

> Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.

See Schneckloth v. Bustamonte, 412 U.S. 218, 263-265 (1973) (Powell, J., concurring).

Id. at 128 (footnote omitted).

The costs entailed by a legitimate issuance of the writ of habeas corpus are severe enough. When the scope of the writ is expanded beyond its statutory limits and beyond the bounds of this Court's decisions, the costs are more than the states and society as a whole should have to bear. *See, Rose v. Mitchell,* 443 U.S. 545, 585-586 (1979) (Powell, J., concurring) (expansion of the writ "inflicts substantial costs on society, our system of justice and our federal fabric"). This Court should protect us from those unnecessary costs by reviewing the decision of the federal appeals court insofar as it holds that facial attacks on state statutes are cognizable in federal habeas corpus proceedings.

II. Certiorari Should Be Granted To Review The Holding That The Harmless Error Rule Is Inapplicable To Certain Types Of Defects In The Sentence Stage Of A Capital Case.

The second question presented by the certiorari petition concerns the Eleventh Circuit Court of Appeals holding that the harmless error rule is completely inapplicable to certain types of errors and defects at the sentencing stage of a capital case. The court below held that defects in capital punishment statutes or procedures which inject impermissible or irrelevant considerations into the sentence be set aside, even if it is proven beyond a reasonable doubt that the error or defect was harmless and that the same sentence would have been imposed if the defect or error had not existed. *Ritter v. Smith,* 726 F.2d 1505, 1517-1519 (11th Cir. 1984) (Pet. App. 39a-49a).

In applying the harmless error rule, the district court in this case found beyond a reasonable doubt that: the habeas petitioner before it [the respondent here] was not harmed or prejudiced by the alleged defects in the sentencing procedures; Ritter would still have been sentenced to death even if the alleged defect had not existed; and "no sentencing authority could reasonably have sentenced [him] to anything other than death regardless of the sentencing procedures employed." *Ritter v. Smith,* 568 F.Supp. 1499, 1508-1509 (S.D. Ala. 1983) (Pet. App. 94a-96a). In so finding, the District Court relied upon the fact that Ritter sought the death penalty immediately upon capture and at trial, and even threatened the jury if the jury failed to impose the death penalty. The Circuit Court never questioned the evidentiary basis of the District Court's findings.

Those unusual facts illuminate the harmless error issue in an extraordinary fashion, but the issue itself is one of general interest. There are now 1,351 murderers on death row in 33 states.[4] While the states with capital punishment statutes have worked diligently to enact and maintain procedures which comport with the constitutional doctrines announced by this Court and the lower federal courts, the task has not been a simple one. As this Court itself noted in *Lockett v. Ohio,* 438 U.S. 586, 602 (1978), "[t]he signals from this Court have not, however, always been easy to decipher." The signals of some of the federal courts of appeal have been even more difficult to decipher. Moreover, all the conceivable questions in the capital pun-

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[4]NAACP Legal Defense and Educational Fund, "Death Row, U.S.A." (May 1984). According to that report five other states have capital punishment statutes but no inmates on death row.

ishment area have not been answered, and the applicable doctrines are fluid ones.

As a result, a large number of state capital punishment sentencing provisions, of both statutory and case law origin, have been struck down since *Furman v. Georgia,* 408 U.S. 238 (1972), and more may be struck down in the future by one federal court or another. That makes any holding that the harmless error rule is inapplicable to broad categories of capital sentencing errors or defects important.

There is another general interest which the ruling of the federal appeals court in this case jeopardizes. Every state with a capital punishment statute has an interest in applying that statute in a non-arbitrary and non-capricious fashion. Indeed, such an interest is a constitutional imperative under *Furman* and its progeny. This constitutionally significant interest is impaired by decisions which undercut the application of the harmless error rule to cases in which the result would unquestionably have been the same regardless of the error or defect. In *Ford v. Strickland,* 696 F.2d 804 (11th Cir. 1983), Chief Judge Godbold spoke of the importance of applying the harmless error rule to errors or defects in the sentencing stage of a capital case. He said:

> Absent a harmless error rule, the death sentencing process will become so time-consuming and cumbersome that the death sentence will be imposed rarely and freakishly, in violation of *Furman v. Georgia,* 408 U.S. 238 (1972). I believe that the Supreme Court did not intend that.

Id., at 823 (concurring opinion).

Disregarding Judge Godbold's concern, the panel of the court of appeals which decided this case carved out

a category of sentencing errors or defects to which the harmless error rule will not be applied no matter what the situation. That court's reliance on *Zant v. Stephens,* 103 S.Ct. 2733 (1983), and *Lockett v. Ohio,* 438 U.S. 586 (1978), for its result is wrong, Pet. at 44-47, and its result appears to squarely conflict with the rationale of *Hopper v. Evans,* 456 U.S. 605 (1982), which applied the harmless error rule to the guilt stage of a capital case, Pet. at 47-49.

The holding of the court below also appears to squarely conflict with the holding of this Court in *Strickland v. Washington,* 52 U.S.L.W. 4565 (1984), concerning ineffective assitsance of counsel. In *Strickland,* this Court held that even when trial counsel has made a serious error that is professionally unreasonable in representing the defendant at the sentence stage of a capital case, the death sentence is not to be set aside "if the error had no effect on the judgment." 52 U.S.L.W. at 4571. The defendant must show prejudice from the error, and it is not enough for him to show that the error had "some conceivable effect on the outcome of the proceeding." 52 U.S.L.W. at 4572. Instead, he must show that there is a "reasonable probability" that but for the errors "the result of the proceeding would have been different." *Id.*

There are two possible results of comparing *Strickland* with the court of appeals holding in this case, and both warrant the granting of certiorari. The first possibility is that the two decisions are inconsistent. Both decisions involve errors at the sentence stage of a capital case, and in both the errors are such that the outcome may be affected in some cases depending on the facts and circumstances. *Strickland* holds that the defendant must show prejudice before gaining a reversal, while the deci-

sion below holds that a reversal is due even if the state proves beyond any reasonable doubt that there was no prejudice. There is a great doctrinal distance between predicating a reversal on a showing of prejudice by the defendant, on one hand, and granting a reversal even when the state proves beyond a reasonable doubt that there was no harm or prejudice, on the other hand. If, as amici believe, there is no legitimate way to bridge that doctrinal distance, then the decision below should be reversed because of *Strickland,* and certiorari should be granted for that reason.

The second possibility is that there is some non-apparent way to reconcile the decision below with *Strickland,* and with *Hopper v. Evans, supra,* which applied the harmless error rule to facial defects in a capital punishment statute. If the decision below can be reconciled with *Strickland* and *Hopper v. Evans,* then this Court should grant certiorari for that purpose. We the amici states, and our courts, need guidance as to the exact nature, scope, and extent of the harmless error rule insofar as errors or defects in the sentencing stage of a capital case are concerned. The extraordinary facts of this case illuminate the issues well and make it a perfect vehicle for providing such guidance.

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CONCLUSION

In view of the foregoing, amici curiae respectfully submit that certiorari should be granted to review the first two questions presented in the certiorari petition.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General of North Carolina

/s/ JOAN HERRE BYERS*
Assistant Attorney General

North Carolina Department
of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 733-2011

*Counsel of Record

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO. 83-1875

FRED SMITH, Commissioner,
Alabama Department of Corrections et al.

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN L. CARROLL
MANDELL & BOYD
Post Office Box 2066
Montgomery, AL 36103
(205) 262-1666

ATTORNEY FOR RESPONDENT

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OPINION BELOW

The decision of the Court of Appeals for the Eleventh Circuit (Appendix A to the petition) is reported at 726 F.2d 1505 (11th Cir. 1984). The decision of the District Court (Appendix B to the petition) is reported at 568 F.Supp. 1499 (S.D.Ala. 1983).

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Does the decision below, which invalidates the 1976 Alabama capital sentencing scheme because of the requirement that the sentencing authority consider a constitutionally impermissible factor, conflict with any decisions of this court?

2. Did the Court below correctly apply the harmless error analysis mandated by this Court's decisions in Zant v. Stephens, ___U.S.___, 77 L.Ed 2d 235 (1983) and Lockett v. Ohio, 438 U.S. 586 (1978)?

3. Did the Court below err in holding that Alabama v. Evans ___U.S.___, 75 L.Ed 806 (1983) did not bar the relief which respondent sought?

STATEMENT OF THE CASE

The respondent Wayne Eugene Ritter was tried, convicted and sentenced to death under the 1975 Alabama capital sentencing scheme which was the subject of this Court's opinion in Beck v. Alabama, 447 U.S. 625 (1980). Under that statutory scheme, if a jury found a defendant guilty of a capital offense, it was required to mandatorily fix the punishment at death. The trial judge was then required to hold a sentencing hearing wherein he was required to weigh the aggravating and mitigating circumstances and the mandatory jury sentence of death. Ala. Code § 13-11-4 (1975) (Repealed 1981). The statute then required him, after he completed his weighing process, to decide whether he "will refuse to accept the death penalty as fixed by the jury."

The constitutional flaws obvious in this scheme were highlighted by this Court in its Beck opinion. As this Court noted:

> [I]t is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to the statistics submitted by the state attorney general, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate sentencing hearing in aggravation and mitigation before he imposes sentence.
>
> Beck v. Alabama, 447 U.S. at 645 (footnote omitted)

Following the remand of the Beck case from this Court, the Alabama Supreme Court, recognizing the obvious deficiencies of the 1975 statute, rewrote the statute. Beck v. State, 396 So.2d 645 (1980). In so doing, they eliminated the mandatory jury verdict provision and ordered new trials for the vast majority of inmates on Alabama's death row. In 1981, the Alabama legislature enacted an entirely new death penalty law, codified at Ala. Code § 13A-5-39 et seq. (1975). Capital trials of offenses occurring after July 1, 1981 have been tried according to that statute. Retrials and resentencing hearings for persons accused of capital crimes prior to the effective date of the 1981 Act have taken place under the procedure mandated in Beck v. State.

Respondent initiated his federal challenge to the constitutionality of the 1975 Alabama capital sentencing scheme

by filing a writ of habeas corpus on May 5, 1984. After being denied relief by the district court, he appealed to the United States Court of Appeals for the Eleventh Circuit which found that the mandatory death sentence provision of the Alabama law under which respondent Ritter was sentenced to death was constitutionally infirm. As the Court remarked:

> [T]he inclusion of the constitutionally invalid factor of the jury's mandatory death sentence in the sentencing determination, and the statutorily required influence of that invalid factor on the judge's sentencing decision, renders the 1975 Alabama death penalty statute's sentencing procedures facially unconstitutional. (App.39a)

The Court then ordered that respondent be given a new sentencing hearing.

ARGUMENT

The decision of the Eleventh Circuit in this case carries none of the majesty or malevolence that the petitioner seeks to bestow on it. It is simply a decision which appropriately administers the coup-de-grace to a capital sentencing scheme that this Court had already mortally wounded in Beck v. Alabama. It concerns a statute which the state itself has buried and no longer uses. The opinion of the Court of Appeals does not order that respondent be set free or even re-tried. It simply requires that he be given a capital sentencing hearing which comports with the Constitution. After such a hearing, he would either be resentenced to death or given a sentence of life imprisonment without the possibility of parole.

Moreover, the decision below articulates no new law, but simply follows settled Supreme Court precedent in determining that respondent is entitled to have a new sentencing hearing. It is a manifestly correct decision which should not be reviewed further by this Court.

I.

THE DECISION BELOW DETERMINING THAT THE ALABAMA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL DOES NOT EXPAND HABEAS CORPUS LAW AND DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE.

The state attempts to portray the decision below as a Frankenstein monster which would radically expand the "Great Writ" by allowing facial constitutional attacks to be brought in habeas cases. In so doing, the state makes an inventive yet disingenuous argument which mixes, without distinction, this Court's jurisprudence on habeas corpus, standing and waiver. The state's argument that facial constitutional attacks cannot be brought in habeas proceedings intentionally blurs the concepts of constitutional error and harm in an attempt to minimize the blatant unconstitutionality of the Alabama death penalty statute here at issue and to undermine the correctness of the decision below.

A. FACIAL CONSTITUTIONAL ATTACKS ARE COGNIZABLE IN A HABEAS CORPUS PROCEEDING

There is simply no support for the contention of the state that facial constitutional attacks cannot be brought in a federal habeas proceeding under 28 U.S.C. 2254. The statute itself contains no such prohibition. Indeed, § 2254 simply speaks of "constitutional violations." There is nothing in the language of the statute to even remotely suggest that a constitutional violation caused by a facially defective statute is to be treated differently than one caused by a trial judge or a prosecutor. Indeed such a construction of the habeas statute would do violence to the statute's plain meaning.

Following the statute's mandate, lower federal courts have consistently entertained facial challenges to death penalty statutes in habeas corpus proceedings. In the wake of this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), lower federal courts consistently vacated death sentences based on the facial invalidity of state statutes. See e.g. Eaton v. Capps, 480 F.2d 1021 (5th Cir. 1973); Newman v. Wainwright, 464 F.2d 614 (5th Cir. 1972). That practice correctly continues today. See Richmond v. Cardwell, 450 F.Supp. 519 (D.Arizona 1978)(Arizona death penalty statute declared facially invalid in a habeas corpus proceeding.) The exercise of habeas corpus jurisdiction over facial challenges has not been limited to capital statutes. See, e.g. U.S. ex rel Newsome v. Malcolm, 492 F.2d 1166 (2nd Cir.

1974); Powell v. Stone, 507 F.2d 93 (9th Cir. 1974) rev'd on other grounds; Stone v. Powell, 428 U.S. 465 (1976). (Facial challenges to state vagrancy laws).

The position of the state, taken to its logical conclusion would deny state criminal litigants the right to challenge the constitutionality of the state statutes under which they had been sentenced. According to the argument of the state, if this Court were to decline to review a facial challenge to a state criminal statute on a petition for writ of certiorari after direct appeal in the state court system, that decision would be tantamount to a decision upholding the constitutionality of the statute since the litigant would not be allowed to raise the issue in a federal habeas corpus proceeding. A decision adopting the state's position would destroy the fabric of habeas corpus and improperly deny a federal forum to litigants who merit it.

B. THE 1975 ALABAMA DEATH PENALTY LAW WAS UNCONSTITUTIONALLY APPLIED TO RESPONDENT RITTER

As previously noted, the state's argument that facial constitutional challenges are not cognizable in habeas corpus proceedings mixes together, without distinction, a series of concepts in an attempt to portray the decision below as an expansion of existing law. The most erroneous mixing occurs as the state tries to argue that the Eleventh Circuit erred when it allowed Respondent to attack the constitutionality of the Alabama death penalty law when, according to its argument he was not prejudiced by it. That argument obviously confuses the question of whether or not there was a constitutional violation with the question of harmless error.

The state premises its argument on this point on the fact that the statute was not unconstitutional as applied to Respondent. That argument is patently specious. The record is clear that the judge in Respondent's case followed the unconstitutional Alabama law and utilized the standardless and unguided jury sentence of death as one of the factors he considered in deciding whether or not to sentence the appellant

to death.[1] Respondent's death sentence was thus based in part on "a constitutionally impermissible factor in Alabama's capital sentencing scheme" (Appendix at p. 37a). It was thus plainly unconstitutional as applied to him. The petitioner's reliance on this court's language in Broadrick v. Oklahoma is misplaced. This case is not a case where the statute may be "applied unconstitutionally to others in situations not before the court." Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). This statute can never be applied constitutionally to anyone so long as the sentencing judge is required to and does take into account the standardless mandatory jury sentence of death in reaching his life or death determination. The question of whether or not there is a constitutional violation is a question separate and apart from a question of harmlessness, see generally, Chapman v. California, 386 U.S. 18 (1967) and the state's confusion of the issue is an obvious attempt to impart an evil hue to the decision of the Court of Appeals. The Court below correctly applied existing law as it regards the issues cognizable in a habeas corpus proceeding and correctly applied the law as it regards standing to raise constitutional challenges. The decision below neither conflicts with this Court's previous decisions nor raises an important question of federal law which this Court should decide.

II.

THE DECISION BELOW CORRECTLY FOLLOWS THE ANALYSIS OF THE HARMLESS ERROR RULE WHICH THIS COURT'S PRIOR DECISIONS HAVE MANDATED BE APPLIED IN CAPITAL CASES

The state seeks to portray the decision below as a "mischaracterization" of this Court's harmless error rules. In reality, the decision below is a narrow, carefully worded opinion which tracks this Court's prior analysis. The Eleventh Circuit did not blaze a path of its own but merely followed the beacon of this Court's opinion in Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235 (1983). As the Court remarked:

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[1] Transcript of state trial at 246. The trial judge in deciding sentence weighed four aggravating circumstances, two mitigating circumstances and the jury's mandatory sentence of death.

> The import of Stephens is clear: a federal harmless error analysis will be applied to a facial constitutional defect in a capital sentencing scheme if, and only if, two criteria are met. First, independent of the invalid factor, the sentencing scheme must limit and channel the sentencer's discretion. Second, the invalid factor must not interject constitutionally impermissible or totally irrelevant considerations into the sentencer's exercise of that discretion. (App. 45a).

The Court then went on to note that in Stephens, both of these criteria were met and the defendant's death sentence was therefore constitutionally imposed. Conversely, the Court concluded in Lockett v. Ohio, 438 U.S. 586 (1978), the first test of Stephens was met but the Ohio statute failed the second and "...the defendant's death sentence was vacated without further inquiry." (App.p.46). The Court then applied the Stephens criteria to the Alabama capital sentencing scheme.

> In the present case, we assume without deciding that, absent the invalid factor of the jury's mandatory death sentence, the 1975 Alabama death penalty statute's statutory aggravating and mitigating factor's suitably limit the sentencer's discretion. We hold, however that this invalid factor injects a constitutionally irrelevant consideration into the sentencer's exercise of that discretion in determining whether to impose a sentence of death. Therefore, as in Lockett, no further inquiry is required, and petitioner's death sentence is due to be vacated. (App. 47a)

The actions of the Eleventh Circuit are perfectly consistent with this Court's actions in other death penalty cases. In Jordan v. Arizona, 438 U.S. 911 (1978), for example, this Court, in the wake of Lockett, vacated the judgment of the Arizona Supreme Court in that case "insofar as it leaves undisturbed the death penalty imposed." This Court vacated the sentence in spite of the fact that the defendant in Jordan presented no evidence in mitigation at his sentencing hearing and was thus not arguably affected by the constitutional error. See Knapp v. Cardwell, 513 F.Supp. 4, 8 (D.Arizona 1980).

The state admits, as it must, that this Court in Stephens did indicate that a death sentence imposed by a sentencer who was required to rely on a factor which is "constitutionally

impermissible or totally irrelevant to the sentencing process" would have to be set aside. Zant v. Stephens, 77 L.Ed2d at 255. It seeks to distinguish the Alabama scheme by arguing that the Stephens test applies only to "aggravating circumstances." That argument is plainly transparent. Since the statutory scheme here under attack required the trial judge to weigh the constitutionally impermissible factor, it matters not whether the factor was labelled an "aggravating circumstance" or not. The fatal flaw is still present because the sentencing authority in sentencing the respondent to death relied on the jury's mandatory sentence of death which was a factor which was constitutionally impermissible and totally irrelevant. The Stephens test was properly applied to the constitutional violation in this case. The decision below reflects the settled law of this Court and does not present a proper question for this Court's review.

III.

THE DECISION BELOW THAT THIS COURT'S DECISION IN ALABAMA V. EVANS DID NOT BAR THE GRANTING OF RELIEF TO RESPONDENT IS EMINENTLY CORRECT

Faced with the obvious constitutional flaw of the Alabama death penalty statute, the state argues that the decision of this Court vacating a lower court stay in his co-defendant's case, see Alabama v. Evans, ___U.S.___, 75 L.Ed 2d 806 (1983), talismanically bars relief for respondent from the unconstitutionality of his death sentence. As the lower court correctly decided, the Evans stay case has no bearing on the outcome of his appeal.

Though Evans and respondent were co-defendants at trial, their paths diverged on appeal. Respondent continued on an orderly course in his appeal process while his co-defendant Evans embarked on a path which ultimately sealed his fate. Following the decision of this Court in Hopper v. Evans, 456 U.S. 405 (1982), the Evans case was sent back to the Eleventh Circuit for that court to decide the constitutionality of Alabama's capital sentencing scheme. In July of 1982, after briefing and before a decision, Evans dismissed his attorneys and filed a motion with the Court of Appeals seeking leave to dismiss his appeals. An

exchange of letters between the Clerk's Office and Evans left no doubt that Evans was fully aware of the legal consequences attendant to dismissal of his appeal. He nonetheless persisted in that course of action and on October 19, 1982 the Eleventh Circuit dismissed his appeal. As he was facing imminent execution, Evans attempted again to utilize the federal habeas corpus system to save his life and failed because he had previously voluntarily dismissed his first set of federal appeals. The Court of Appeals found that Alabama v. Evans, did not bar relief for respondent on at least four grounds. First, Alabama v. Evans, was not a decision on the merits of a constitutional challenge to Alabama's 1975 death penalty law but was a decision on an application to vacate a stay; Second, the merits of the sentencing claim were not discussed; Third, the Court's analysis of Evans' claims was consistent with its analysis of successor habeas petitions and lastly, the dissent of Justice Marshall clearly shows that the decision was not intended as one on the merits of Evans' sentencing claims. (App.25a-27a). The Court's opinion is totally supported by the text of the Alabama v. Evans opinion and this Court's jurisprudence. There are no grounds upon which the decision should be reviewed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

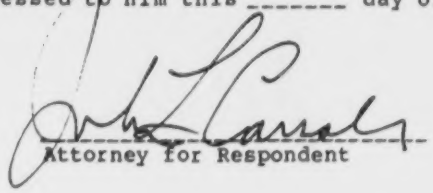
Respectfully submitted,

JOHN L. CARROLL
MANDELL & BOYD
Post Office Box 2066
Montgomery, Alabama 36103

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been served upon Ed Carnes, Assistant Attorney General, by U. S. Mail, postage prepaid, properly addressed to him this _____ day of July, 1984.



Attorney for Respondent

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CLERK

No. 83-1875

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRED SMITH, Commissioner, Alabama Department of Corrections; and W. E. JOHNSON, Warden, Holman Unit,

Petitioners

v.

WAYNE EUGENE RITTER,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF AND APPENDIX

Charles A. Graddick
Alabama Attorney General

Edward E. Carnes
Assistant Alabama
Attorney General

250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

Counsel for Petitioners

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ARGUMENT

I. AN INTERVENING DECISION OF THE ALABAMA SUPREME COURT DEMONSTRATES THE NEED FOR CERTIORARI

Since the certiorari petition was filed, the Alabama Supreme Court has issued a decision which underscores the practical necessity for this Court to review the Eleventh Circuit decision in this case. On July 13, 1984, the Alabama Supreme Court affirmed the death sentence in Ex parte Baldwin, No. 83-276 (reproduced in the appendix hereto), which is one of Alabama's nine other pre-Beck v. Alabama, 447 U.S. 625 (1980), death sentence cases. The Baldwin decision is significant for two reasons.

A. The Baldwin Decision Proves that the Conflict Between the Eleventh Circuit and the Alabama Supreme Court Will Continue Unabated Unless Resolved by this Court

The appellant in Baldwin, like respondent Ritter in the present case, was sentenced under Alabama's pre-Beck sentencing procedures. Baldwin argued that he, too, was entitled to have his sentence reversed on the authority of the Eleventh Circuit's decision in the present case. The Alabama Supreme Court acknowledged the Eleventh Circuit's decision in this case, but it refused to follow that decision. (App. 24a - 35a)

After noting that neither this Court nor it had ever held the pre-Beck sentencing procedures unconstitutional, the Alabama Supreme Court reiterated its earlier holding in this case, Ritter v. State, 429 So.2d 928 (Ala. 1983), that those procedures were constitutional. In doing so, the Court

criticized the Eleventh Circuit's reasoning, and explained how it was flawed:

> We emphasize that the trial court must conduct a separate sentencing hearing, which is independent of the guilt phase of the proceeding. Section 13-11-4 requires the court to weigh all of the aggravating circumstances against all of the mitigating circumstances, and make its sentencing determination. The court shall either sentence the defendant to death, and necessarily accept the jury's sentence, or sentence the defendant to life imprisonment without parole, and necessarily reject the jury sentence.
>
> We hold that the sentencing procedure under the 1975 Death Penalty Act is constitutional, even though the jury has no discretion in sentencing. The statute is saved by the fact that the court, which is the sentencing authority, considers the circumstances of the particular offense and the character and propensities of the offender, i.e., the aggravating and mitigating circumstances, in a separate and independent sentencing hearing, and then imposes the sentence.

(App. 32a - 33a) (emphasis in original).

The Court went on to explain that the reason

it revised the sentencing procedures in Beck v. State, 396 So.2d 645 (Ala. 1980), was inapplicable to these pre-Beck cases like Baldwin and Ritter. (App. 33a - 35a)

The Alabama Supreme Court's Baldwin decision underscores the conflict between that court and the Eleventh Circuit, a conflict which only this Court can resolve. Unless this Court does resolve the conflict, the Alabama Supreme Court will continue to affirm the sentences in those cases, and the Eleventh Circuit, or a federal district court obedient to its mandate, will continue to set them aside. The resulting friction will damage federal-state relations and inter-jurisdictional judicial harmony. Only a decision by this Court can settle the matter and prevent further friction between the federal appeals court and the state supreme court.

B. The Baldwin Decision Underscores the Need for this Court to Clarify the Basis of its Decision in Alabama v. Evans, 103 S.Ct. 1736 (1983)

The second reason the Alabama Supreme Court's Baldwin decision is significant is that it underscores the dispute about the basis of this Court's decision in Alabama v. Evans, 103 S.Ct. 1736 (1983). In addition to holding that the pre-Beck sentence procedures were constitutional under its own reasoning, the Alabama Supreme Court in Baldwin also held that the issue had been at least implicitly decided by this Court in Alabama v. Evans, 103 S.Ct. 1736 (1983).

The court noted that Evans had raised the same sentence procedure issue that Baldwin and Ritter raised and that this Court had nonetheless vacated the stay of execution in Evans. (App. 27a - 28a) After considering the matter carefully, the court concluded:

> The Supreme Court in Alabama v. Evans, supra, did review the issue that Ritter raised and which petitioner now raises and did not find that it was a "substantial" question. Evans was executed on the same day, but after the stay was vacated. We cannot presume that the Supreme Court would have allowed the execution to take place if it had had even the slightest doubt whether Evans's challenge to the sentencing procedure had some merit.

(App. 28a) The Alabama Supreme Court has thus agreed with the federal district court in this case (Pet. App. 149a - 150a), and disagreed with the federal appeals court (Pet. App. 22a - 27a, 52a), about the meaning of Alabama v. Evans, supra. This Court can and should settle that disagreement.

II. THIS CASE DOES PRESENT THE HABEAS CORPUS FACIAL ATTACK ISSUE, AND IT IS AN IMPORTANT QUESTION

A. The Facial Attack Question is Squarely Presented Because Ritter Did Not Even Suggest Below that the Statute Was Prejudicially Applied to Him

In his attempt to avoid the full implications of the federal appeals court holding that facial attacks on state statutes are cognizable in habeas proceedings, Respondent Ritter argues to this Court that Alabama's pre-Beck statute was unconstitutionally applied to him. He implies that the facial validity issue is an unnecessary one interjected by the state. As the court of appeals opinion clearly shows, that simply is not true.

The court of appeals did not overturn the district court's holding that the statute was constitutional as applied to Ritter. (Pet. App. 158a). Instead, the court of appeals held the statute "facially unconstitutional" (Pet. App. 39a), and in doing so explained:

> because the petitioner [Ritter] challenges the statute on its face, and not as applied to him, the influence of the constitutionally impermissible factor of the

> jury's mandatory death sentence on the judge's sentencing determination in a close case requires a finding of facial unconstitutionality.

(Pet. App. 58a) (emphasis added). The reason Ritter did not challenge the statute as applied to him is significant.

The district court had found that the statute was not unconstitutionally applied to Ritter, because he was not in any way prejudiced by it. (Pet. App. 158a - 160a) Indeed, when any alleged defects are proven harmless beyond a reasonable doubt, as they were in this case (Pet. 25-26), there can be no prejudice. Therefore, Ritter could not argue and the court of appeals could not hold that the statute had been unconstitutionally applied to him.

Ritter and the court of appeals were thus compelled by the facts to fashion an expansive new doctrine for habeas relief. The doctrine they created permits facial attacks

on state statutes, and it holds that a petitioner who is not prejudiced by a statute is nonetheless entitled to relief if the statute might prejudicially affect another defendant whose case involves entirely different facts. Thus, the facial attack issue was not set up by the State. Instead, it was created by the court of appeals at the insistence of Ritter. The issue is squarely presented not only by the holding below, but also by the facts of this case which caused Ritter to forego in the court of appeals any challenge to the statute as applied to him.

B. The Facial Attack Question is an Important One

Ritter's position, which the court of appeals adopted, that facial attacks on state statutes are cognizable in federal habeas proceedings, is wrong for three reasons.

First, his position is based on a misquotation of 28 U.S.C. §2254. Contrary to the assertion on p. 3 of Ritter's opposition brief, §2254 does not use the term "constitutional violations." Instead, §2254(a) plainly states that federal courts shall entertain a state prisoner's habeas application "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." That language precludes a federal court from entertaining a facial attack on a state statute and granting a habeas petitioner relief based on how the statute might apply in some other case not before the court.

Second, Ritter has not been able to cite a single decision of this Court authorizing federal habeas courts to entertain facial attacks on state statutes. Jaehne v. New York, 128 U.S. 189 (1888), which he ignores,

holds to the contrary. In that decision this Court said that even if a state statute might apply unconstitutionally in some other case, a habeas petitioner to whom the statute was not unconstitutionally applied is entitled to no habeas relief.

Third, Ritter's position, which is the court of appeals holding, squarely conflicts with the well-established doctrine that a habeas petitioner must allege and demonstrate prejudice in order to be entitled to relief. This Court has so held, e.g., United States v. Frady, 456 U.S. 152, 175 (1982); Henderson v. Kibbe, 431 U.S. 145, 154 (1977), and federal appeals courts have recognized the prejudice requirement, e.g., Hutchins v. Garrison, 724 F.2d 1425, 1434 (4th Cir. 1983) (capital case); Wabasha v. Solem, 694 F.2d 155, 159 (8th Cir. 1982); Lockett v. Blackburn, 571 F.2d 309, 314 (5th

Cir.), cert. denied, 439 U.S. 873 (1978). Indeed, the court of appeals that decided this case has itself held that a habeas petitioner "must allege and demonstrate prejudice," Hopkins v. Jarvis, 648 F.2d 981, 985-986 (5th Cir. Unit B 1981) (excellent discussion), and it has so held in capital cases, e.g., Stanley v. Zant, 697 F.2d 955, 972 (11th Cir. 1983); Ross v. Hopper, 716 F.2d 1528, 1540 (11th Cir. 1983).

A facial attack, by definition, dispenses with any showing of prejudice. Neither Ritter nor the court of appeals have even attempted to reconcile their position that facial attacks are permissible in habeas with the holdings of this Court and the federal appeals courts that a showing of prejudice is a prerequisite to habeas relief. No reconciliation is possible.

III. THE HARMLESS ERROR QUESTION, WHICH RITTER CONCEDES IS SQUARELY PRESENTED, IS AN IMPORTANT ONE

Ritter implicitly concedes, as he must, that the harmless error issue is squarely presented. Faced with the extraordinary facts, Ritter does not even suggest that any defect in the statute was not harmless beyond a reasonable doubt. See Brief For Respondent in Opposition, at 5-7. Instead, he argues that the court of appeals was correct in fashioning a per se rule that the harmless error doctrine is totally inapplicable to sentencing procedure errors like the one alleged in this case.

According to Ritter, and the court of appeals, a federal court must vacate a state court sentence even if there is no reason at all to doubt that the result would have been the same if the alleged defect had not

existed (Pet. App. 95a-96a, 146a-147a, 150a-151a), and even if it is "inconceivable" that the result would have been any different (Pet. App. 150a-151a). Such a position amounts to an irrebutable presumption of harm, the inappropriateness of which is demonstrated by the extraordinary facts of this case.

Ritter does not even attempt to reconcile his position, and the court of appeals holding, with Strickland v. Washington, 104 S.Ct. 2052 (1984), which is discussed on pp. 12 - 13 of the amicus brief which thirty-one states have filed in support of certiorari. For reasons stated therein, the conflict or apparent conflict between the court of appeals holding in this case and this Court's decision in Strickland justifies review.

Nor does Ritter discuss this Court's decision in Hopper v. Evans, 456 U.S. 605 (1982), which is inconsistent with the court

of appeals holding in this case for the reasons stated on pp. 47 - 49 of the certiorari petition.

As we have conceded, there is some dictum in Zant v. Stephens, 103 S.Ct. 2733 (1983), which at first blush supports the court of appeals interpretation of that decision. However, the language in question is clearly dictum, and it is distinguishable from the present case. See, Pet. 45-47. Nonetheless, Ritter says that that dictum is a "beacon" which the court of appeals followed. There is much irony in this.

The irony is that this same chain of events occurred in the case of Ritter's co-defendant, John Louis Evans. This Court's opinion in Beck v. Alabama, 447 U.S. 625 (1980), contained broad dictum about the preclusion clause of this same statute. The same court of appeals used that dictum as a

beacon which guided it to order a new trial for Ritter's co-defendant. Evans v. Britton, 628 F.2d 400 (5th Cir. 198), extended, 639 F.2d 221 (1981) (on rehearing). This Court then reversed the court of appeals and reinstated the conviction. Hopper v. Evans, 456 U.S. 605 (1980). In doing so, this Court noted that, "[t]he Court of Appeals misread our opinion in Beck," and that it took certain language out of context. Id., at 610-611. Much of the problem stemmed from the fact that the court of appeals did not recognize that the uniqueness of the facts in Hopper v. Evans presented a different issue than the one that had been addressed with broad language in Beck. Hopper v. Evans, 456 U.S. at 612.

Now, it has happened again. The same court of appeals, at Ritter's urging, has misread another of this Court's opinions,

this time the one in Zant v. Stephens, 103 S.Ct. 2733 (1983). The court of appeals has taken dictum out-of-context from that opinion and has misapplied it to Ritter's case. That court has again ignored the uniqueness of the facts in this case, facts which are drawn from the same joint trial involved in Hopper v. Evans, supra. Once again, it is time for this Court to correct this court of appeals misinterpretation of one of its opinions. No one else can.

CONCLUSION

Certiorari should be granted, and the court of appeals should be summarily reversed. In the alternative, the case should be set down for plenary review.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

EDWARD E. CARNES*
ASSISTANT ALABAMA
ATTORNEY GENERAL

Counsel for Petitioners

*Counsel of Record

APPENDIX

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1984

Ex Parte: Brian Keith Baldwin

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Brian Keith Baldwin

83-276 v.

State)

PER CURIAM.

Brian Keith Baldwin was indicted for, and convicted of, the capital offense of "robbery ... with the aggravated circumstance of intentionally killing the victim." Ala. Code 1975, § 13-11-2(a)(2) (repealed 1981, Act No. 81-178, § 20, but effective as to conduct occurring July 1, 1981). He was sentenced to death.

The conviction was affirmed originally by the Court of Criminal Appeals in 1978, Baldwin v. State, 372 So.2d 26 (Ala.Crim. App. 1978), and by this Court in 1979, Ex Parte Baldwin, 372 So.2d 32 (Ala. 1979) (Baldwin I). After having granted certiorari, the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980). Baldwin v. Alabama, 448 U.S. 903 (1980). This Court remanded the case to the Court of Criminal Appeals, Baldwin v. State, 405 So.2d 699 (Ala. 1981), which once again affirmed the conviction, Baldwin v. State, [MS. November 1, 1983] ___ So.2d ___ (Ala.Crim.App. 1983). Baldwin's present petition for writ of certiorari was granted as a matter of right under A.R.A.P., Rule 39(c).

The facts of this case have been set out repeatedly in the above decisions. We only

briefly reiterate them. Petitioner and Edward Horsley, escapees from a North Carolina prison camp, abducted their young victim in Hudson, North Carolina. They took control of her automobile and locked her in the trunk. They then drove the car from North Carolina, through South Carolina and Georgia, to Monroe County, Alabama, where they intentionally killed her. Petitioner and Horsley had separate trials in the Circuit Court of Monroe County.

Petitioner now raises these issues:

(1) Was petitioner prejudiced at trial by the existence of the preclusion clause and, therefore, entitled to a new trial under Beck v. Alabama, 447 U.S. 625 (1980)?

(2) Was the prosecutor's remark in his opening statement, that the petitioner had escaped from a prison camp in North Carolina, reversible error?

(3) Was a prospective juror improperly excluded under Witherspoon v. Illinois, 391 U.S. 510 (1968)?

(4) Are the sentencing provisions of the 1975 Death Penalty Act, under which petitioner was sentenced, unconstitutional?

(5) Was it improper to consider the petitioner's prior youthful offender and juvenile adjudications as aggravating circumstances to support the sentence of death?

I.

Petitioner's trial was held in 1977, before the preclusion clause of the 1975 Death Penalty Act was struck down by the United States Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980). The only offense with which petitioner was charged, and for which he was tried, was the capital offense of robbery in which the victim is intentionally killed. In accordance with the then existing

preclusion clause, contained in § 13-11-2(a), Ala. Code 1975, the jury was not allowed to consider any lesser included offenses during its deliberations. It returned a verdict of guilty of capital murder.

Petitioner now contends that under Beck v. Alabama, supra, he is entitled to a new trial because he was prejudiced by the existence of the preclusion clause. The complete test to determine the effect of the preclusion clause on a pre-Beck trial was set out in Cook v. State, 431 So.2d 1322 (Ala. 1983):

> "(1) Was there any evidence presented at trial upon which a conviction of a lesser included offense could have been based? (2) If not, has the defendant suggested any plausible claim which he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial? If the answer to both of these questions is no, then a conviction at trial is due to be affirmed."

Cook v. State, 431 So.2d at 1324. The first question is taken from Beck v. Alabama, supra. The second one was posed first in Hopper v. Evans, 456 U.S. 605 (1982).

Petitioner asserts that the answer to both questions is yes. We do not agree.

Regarding the first part of the test, petitioner contends that although the murder most probably occurred in Alabama, the great weight of the evidence shows that the robbery, if any, took place entirely within North Carolina, where he and Horsley took control of the victim's car. Petitioner argues that he committed, at most, first degree murder in Alabama, and he would have been entitled to a jury charge on this offense had the preclusion clause not existed.

Alabama's jurisdiction to try and convict petitioner for the capital offense of robbery in which the victim is intentionally

killed is not dependent upon the venue of the robbery. Petitioner may be convicted of this offense regardless of where the robbery occurred. Therefore, evidence that the robbery took place in North Carolina does not entitle petitioner to a jury charge on first degree murder. We made this clear in Baldwin I when we defined this capital offense and held that Alabama had jurisdiction to convict petitioner of the crime:

> "The crime of robbery when the victim is intentionally killed is a single offense beginning with the act of robbing or attempting to rob and culminating with the act of intentionally killing the victim. The offense consists of two elements, robbing and intentionally killing, but does not consist of two separate offenses. See Ex parte Clements, 370 So.2d 723 (Ala. 1979); Horsley v. State, [1 Div. 931] (Ala. Crim. App. 1978). Therefore, although the offense was commenced in North Carolina, it was not consummated until Naomi Rolon was killed in Monroe County, Alabama.
>
> "The place where the crime was consummated is the place where the crime was committed and the place

where the defendant may be tried. 21 Am. Jur. 2d Criminal Law § 399, at 416. Section 15-2-4 provides:

> "'When the commission of an offense commenced elsewhere is consummated within the boundaries of the state of Alabama, the offender is liable to punishment in Alabama, although he was out of the state at the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent or by any other means proceeding directly from himself; and venue in such case is in the county in which the offense was consummated, unless otherwise provided by law.'
>
> "§ 15-2-4, Code 1975.
>
> "Accordingly, venue did lie in Monroe County and petitioner was properly tried and convicted. The decision of the Court of Criminal Appeals is affirmed."

Baldwin I, 372 So.2d at 33, 34.

We have searched the entire record and have found no other evidence to support a verdict of guilty of a lesser included offense. Petitioner is not entitled to a new

trial under Beck v. Alabama, supra, and the answer to the first question must be no.

Prior to closing arguments at trial, the trial court ruled that Alabama had jurisdiction to convict the petitioner of the capital offense, if both the robbery and the intentional killing occurred in Alabama. It also determined that the venue of the crime was a question of fact to be determined by the jury. It instructed the jury accordingly:

> "I think this case really comes down to this, ladies and gentlemen. I want to put it to you in two different questions. There are two questions that this jury must answer: First, did the defendant rob Naomi Rolon in Monroe County, Alabama, as I have defined the term? Second, did the defendant intentionally kill Naomi Rolon in Monroe County, Alabama, in the course of said robbery?
>
> "If each and every one of you are convinced beyond a reasonable doubt and to a moral certainty that the answer to each of these questions is 'yes,' your verdict should be guilty. If you are not so convinced, your verdict should be not guilty."

Petitioner correctly argues that the decision in Baldwin I necessarily holds that the trial court's charge to the jury was incorrect. However, petitioner was not prejudiced by this error. Under the court's charge, the jury was required to find not only that the petitioner intentionally killed the victim in Monroe County, but also that he robbed her there. This charge, although erroneous, was to petitioner's benefit, not his detriment. Petitioner argues otnerwise. He contends that this charge presented to the jury the very dilemma that the United States Supreme Court hoped to eradicate by its decision in Beck v. Alabama, supra. It was concerned that a jury would convict a defendant of a capital offense, even if it had some doubt as to the existence of some element of the crime, rather than let the defendant go free. However, we find that petitioner's case is

different. Even if the jury had some doubt about the venue of the robbery, its conviction on the capital offense is supported by the evidence, because, under Baldwin I, petitioner is guilty of the offense, regardless of where the robbery took place. The effect of the incorrect jury instruction made it more difficult to convict petitioner, but it did not result in an unconstitutional conviction.

Petitioner next argues that if we affirm Baldwin I, which we have done, then his defense at trial was invalid and frivolous, and, consequently, he received ineffective assistance of counsel.

The burden of proof is upon the petitioner. The United States Supreme Court, in a very recent decision, Strickland v. Washington, ___ U.S. ___ (1984) [No. 82-1554, 52 U.S.L.W. 4565], explicitly described the burden of proof with regard to this claim.

First, petitioner must show that counsel's performance was so deficient as to fall below an objective standard of reasonableness. Counsel's conduct must be considered within the context of the facts of the particular case and as of the time of the alleged misconduct. Second, petitioner must show that counsel's deficient performance prejudiced the defense and deprived petitioner of a fair trial. Prejudice is shown when, absent the errors, there is a reasonable probability that the jury would have had a reasonable doubt respecting guilt.

At the time of the trial, the defense asserted was not frivolous, because, if the jury had believed petitioner and found the facts to be as he contended, i.e., that the robbery occurred in North Carolina, he would have been acquitted of the charge. Therefore, under the law of the case, trial counsel's decision to use this defense against

the charge was sound. Counsel did not fail in the performance of his duty to present the best defense possible under the law. We need not consider the second factor of the test in Strickland.

Returning to the test in Cook v. State, supra, for the effect of the preclusion clause, we answer the second question of that test in the negative also. Petitioner has not suggested any plausible claim which he would have made had there been no preclusion clause. Petitioner must not only suggest a defense which he might have made, but he must also show that he did not assert the defense because of the preclusion clause. Hopper v. Evans, supra; Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984), petition for cert. filed, 52 U.S.L.W. 3875 (U.S. May 15, 1984). If we did not require this last showing, petitioner conceivably could assert any defense which has now occurred to

him and demand that he be given a new trial at which he may raise a new defense. This could not be what the United States Supreme Court intended in Hopper v. Evans, supra, when it formulated this part of the test. That court was concerned with the effect the preclusion clause had upon the trial, i.e., whether the "brooding omnipresence" of the preclusion clause in any way influenced the defendant's decision on how to defend against a capital charge. The Supreme Court specifically stated that "a defendant might make a plausible claim that he would have employed different trial tactics -- for example, that he would have introduced certain evidence or requested certain jury instructions -- but for the preclusion clause." (Emphasis added.) Hopper v. Evans, 456 U.S. at 612-13 n. This should not be construed as an invitation to all defendants tried under the 1975 Death Penalty

Act to defend against the capital charge anew before the appellate courts, asserting any new defense not presented at trial, without regard to whether it was one that was considered and discarded because of the preclusion clause.

Petitioner suggested during oral argument that he might have defended by presenting evidence that at the time of the killing he was under the influence of narcotics and unable to form the specific intent to kill. There was no showing that the existence of the preclusion clause stopped petitioner from asserting this defense. There is not even an inference that this was the case. Petitioner could have made this defense at trial and have been acquitted, if it were successful. The jury was charged that specific intent was an element of the capital offense, and that it must find that specific intent in order to return a verdict of

guilty. No other claims are put forth by petitioner.

We hold that petitioner was not prejudiced by the existence of the preclusion clause and that he was not entitled to an instruction on a lesser included offense. There was no evidence presented at trial which would have supported a conviction of a lesser included offense, nor has petitioner suggested any plausible claim which he would have made but for the preclusion clause.

II.

Petitioner contends that he was denied an impartial jury as guaranteed by the Sixth Amendment of the United States Constitution, because one of the prospective jurors was excluded improperly. He contends that this prospective juror was excluded solely because she would not fix punishment at death even if she "were convinced beyond a

reasonable doubt of the guilt of this defendant." He argues that Witherspoon v. Illinois, 391 U.S. 510 (1968), requires that a juror be excluded only "if [s]he is irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." Witherspoon v. Illinois, 391 U.S. at 522, n. 21. Petitioner insists that this juror was excluded for reasons which fall below the standard set in Witherspoon.

The Court of Criminal Appeals held that this prospective juror was not excluded in violation of the principles of Witherspoon. That Court, upon review of the pertinent portion of the record, which is set out in the opinion, found that the prospective juror "unequivocally told the trial judge that she could not, under any circumstances, impose the death penalty on this appellant,

and that she would automatically vote against its imposition." Baldwin v. State, ___ So.2d ___ (Ala.Crim.App. 1983). It noted that the trial court does not have to use the exact words of the United States Supreme Court in Witherspoon during examination of the jurors in order to fulfill the standards set by that decision.

We adopt the holding of the Court of Criminal Appeals and add one citation. In Ex Parte Dobard, 435 So.2d 1351 (Ala. 1983), we affirmed the exclusion of a prospective juror who had a "fixed opinion against capital punishment"and who would not be able "to return a verdict sentencing someone to the electric chair if they were found guilty beyond a reasonable doubt and to a moral certainty of the crime of the charges." Dobard, 435 So.2d at 1356. The juror's exclusion was proper even though the exact language of Witherspoon was not used by the

trial court, because it was "difficult to envision how [the] ... prospective juror could have been more explicit in expressing an unqualified opposition to the death penalty." Dobard, 435 So.2d at 1356. Similarly, in this case, a review of the transcript of the voir dire examination of the prospective juror whose exclusion is questioned makes it unmistakably clear that this prospective juror would not vote for the death penalty under any circumstance.

For these reasons and the reasons contained in the opinion of the Court of Criminal Appeals, we hold that the prospective juror's exclusion was proper and that petitioner was not denied his constitutional right to an impartial jury.

III.

Petitioner next argues that the prosecutor's remarks during his opening statement,

that petitioner had escaped from a North Carolina prison camp only hours before meeting the victim and abducting her, were reversible error. The rules regarding what is permissible during opening statement are well settled:

> "Erroneous insistences and prejudicial conduct on the part of district attorneys tend unduly to prejudice and bias the jury against the defendant. It is not permissible for the solicitor to make an emphatic statement that the defendant is guilty of the crime charged. Rowland v. State, 31 Ala. App. 605, 20 So.2d 881 (1945). The prosecution's opening statement to the jury on what it expects to prove should be confined to statements based on facts admissible in evidence. Higdon v. State, 25 Ala.App. 209, 143 So. 213 (1932). Counsel, however, is to be allowed considerable latitude in presenting to the jury in his opening statement what he expects the evidence to show. Rogers v. State, 49 Ala.App. 78, 268 So.2d 859 (1972). The trial judge must be given wide discretion in determining whether the making of a certain utterance by the District Attorney requires that a mistrial be granted. Ballard v. State, 51 Ala. App. 393, 286 So.2d 68 (1973)."

White v. State, 294 Ala. 265, 314 So.2d 857,

861-2 (1975); cert. denied, White v. Alabama, 423 U.S. 951 (1975); reh. denied, 423 U.S. 1039 (1975).

The issue then is whether the questioned remark was based on facts admissible in evidence. The Court of Criminal Appeals properly answered this question:

> "Generally, evidence of other crimes which a defendant has committed is not admissible at his trial on a particular offense. McElroy's Alabama Evidence, § 69.01(1), Third Edition (1977). However, the prosecutor's statement falls within one of the widely recognized exceptions to the general rule.
>
> "'... [I]f two or more crimes constitute one criminal transaction, evidence of the other crime or crimes is admissible. In Parsons v. State, 251 Ala. 467, 477, 38 So.2d 209, it was stated:
>
> "'"But the rule is that if several crimes in fact constitute one criminal transaction, evidence of all such crimes may be given as part of the res gestae of the offense with which defendant is charged. Allison v. State, 1 Ala.App. 206, 55 So. 453; Askew v. State, 6 Ala.App.

41, 60 So. 455; Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782."'

"'Judge McElroy, citing numerous supporting authorities, has the following to say on the subject:

"'"Evidence of accused's commission of another crime is admissible if such other crime is inseparably connected with, or is a 'part of the res gestae' of the, now-charged crime; or, if such other crime and the now-charged crime are parts of one continuous transaction or one continuous criminal occurrence...'" McElroy, Law of Evidence in Alabama, § 69.01(3)."'

"Brown v. State, 338 So.2d 1050 (Ala. Crim.App. 1976).

"From a review of the record, it is clear to this court that this escape commenced the series of events that eventually led to the killing of the victim herein."

Baldwin v. State, ___ So.2d at ___ (Ala. Crim.App. 1983).

Evidence of the escape is admissible under this exception, and such evidence, in fact, was admitted. Petitioner's sworn statement, in which he told of his escape

and the subsequent events, was admitted. The prosecutor was within reason at the time he delivered his opening statement to expect that such evidence would be admitted.

We do not find any abuse of discretion by the trial court in allowing the remark to be made to the jury during the prosecutor's opening statement and, accordingly, affirm the Court of Criminal Appeals decision that there was no reversible error committed.

We hold that petitioner was not entitled to a jury instruction on a lesser included offense. We also hold that there was no reversible error committed during the trial. We have reviewed the entire record of the trial proceeding and find no error which "has or probably has adversely affected the substantial rights of the petitioner." A.R.A.P., Rule 39(k). Accordingly, we affirm the conviction.

IV.

We now consider petitioner's challenge to the sentencing phase of the proceedings. He contends that the sentencing provisions of the 1975 Death Penalty Act, under which he was sentenced, are unconstitutional.

The relevant provisions state:

> "§ 13-11-2(a) If the jury finds the defendant guilty [of one of the aggravated offenses listed in § 13-11-2], it shall fix the punishment at death....
>
> "....
>
> "§ 13-11-3. If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole....
>
> "§ 13-11-4. Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court,

> after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death."

These provisions have never been held to be unconstitutional by this Court or by the United States Supreme Court. Ritter v. State, 429 So.2d 928 (Ala. 1983); Beck v. State, 396 So.2d 645 (Ala. 1980). The Eleventh Circuit Court of Appeals, in Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984), however, has held recently that these sentencing provisions are unconstitutional on their face.

Petitioner relies solely upon this Eleventh Circuit decision to support his argument that the 1975 sentencing procedure is unconstitutional. This issue was raised by Ritter on a petition for writ of habeas corpus.

The Eleventh Circuit first noted that the 1975 sentencing procedure (§ 13-11-4)

provides for a mandatory death sentence by the jury. The Court held that such a death sentence "is unguided and standardless, reflects no consideration of the particular defendant or crime, and is irrelevant to the sentencing process," Ritter v. Smith, 726 F.2d at 1516, and is, therefore, unconstitutional. The Court recognized that in Alabama the trial judge, not the jury, is the sentencing authority, and that a separate sentencing hearing is held by the trial judge after the jury returns a verdict of guilty of a capital offense. However, it found that

> "the statute [§ 13-11-4] requires the judge to weigh the mandatory death sentence factor in the balance with his consideration of aggravating and mitigating circumstances in deciding to impose the death penalty. Id. Thus, the constitutionally impermissible factor of the jury's mandatory death sentence must be given weight in the judge's own sentencing decision."

The Eleventh Circuit Court of Appeals

concluded by holding that

> "the inclusion of the constitutionally invalid factor of the jury's mandatory death sentence in the sentencing determination, and the statutorily required influence of that invalid factor on the judge's sentencing decision, renders the 1975 Alabama death penalty statute's sentencing procedures facially unconstitutional."

Ritter v. Smith, 726 F.2d at 1516-1517.

The United States Supreme Court has also considered the constitutionality of the 1975 sentencing procedure in Alabama v. Evans, ___ U.S. ___, 103 S.Ct. 1736 (1983). The Court vacated a stay of execution which had been granted by the district court. In doing so, it stated that "[r]espondent's petition for writ of habeas corpus filed on April 21, 1983, [in the District Court for the Southern District of Alabama] thus seeks to litigate several issues conclusively resolved in prior proceedings [including the constitutionality of the 1975 sentencing procedure] and a claim never before raised."

Alabama v. Evans, ___ U.S. at ___.

A stay is issued "only if there is a substantial question to be preserved for further proceedings in the courts." Rosenberg v. United States, 346 U.S. 273, 288 (1953). Therefore, in order to vacate a stay of execution, the Supreme Court must review all of the issues to determine if any of them are "substantial" and unanswered.

The Supreme Court in Alabama v. Evans, supra, did review the issue that Ritter raised and which petitioner now raises and did not find that it was a "substantial" question. Evans was executed on the same day, but after the stay was vacated. We cannot presume that the Supreme Court would have allowed the execution to take place if it had had even the slightest doubt whether Evans's challenge to the sentencing procedure had some merit.

This Court also addressed the constitutionality of the 1975 sentencing procedure, one year before the Eleventh Circuit's decision was handed down, in Ritter v. State, 429 So.2d 928 (Ala. 1983), upon remand from the United States Supreme Court for consideration in light of Hopper v. Evans, 456 U.S. 605 (1982). Ritter v. Alabama, 457 U.S. 1114 (1982). Like petitioner, Ritter was tried in 1977 under the original 1975 Death Penalty Act. He has never been retried or resentenced. We held, Ritter v. State, 429 So.2d 928, as did the Eleventh Circuit, Ritter v. Smith, 726 F.2d 1505, that Ritter was not prejudiced by the existence of the preclusion clause at the time of his trial and is not entitled to a new trial under Beck v. Alabama, supra, or Hopper v. Evans, supra. This is also what we held in petitioner's case. However, unlike the Eleventh Circuit, we upheld the sentencing provisions of the

1975 act. We reaffirm that holding today.

Section 13-11-2(a) of the 1975 act mandates that "[i]f the jury finds the defendant guilty, it shall fix the punishment at death." The jury has no discretion in sentencing. The statute also makes it clear, however, that the court, not the jury, is the sentencing authority and that the jury's sentence of death is merely advisory.

> "The requirement that the jury fix punishment at death if it finds the defendant guilty is in no way binding on the trial court in the latter's role as the sentencing authority. Section 13-11-4 provides in pertinent part that, 'notwithstanding the fixing of the punishment at death by the jury...,' the court, following the sentencing hearing and after weighing the aggravating and mitigating circumstances may sentence the defendant to either death or life imprisonment. See, Beck v. State, 396 So.2d 645 (Ala. 1980). Under Alabama's statute the trial court and not the jury is the sentencing authority. Jacobs v. State, 361 So.2d 640 (Ala. 1978)."

Furthermore,

> "Additionally, by providing for separate proceedings for determination

of guilt and punishment, Alabama's death penalty statute eliminates those vices enumerated in Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). In Roberts, the court pointed out the constitutional weakness of a mandatory death sentence:

> "'The constitutional vice of mandatory death sentence statutes -- lack of focus on the circumstances of the particular offense and the character and propensities of the offender -- ....' (Emphasis added.)

"That point was reemphasized in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), when the Supreme Court said that capital sentencing decisions must focus 'on the circumstances of each individual homicide and individual defendant.' See also, Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (O'Connor, J., dissenting). This rationale is for the purpose of 'determin[ing] independently whether the imposition of the ultimate penalty is warranted.' Proffitt, at 428 U.S. at 253, 96 S.Ct. at 2967.

"In Ritter's case, the trial court had a separate sentence hearing and considered, as it appears in its findings after that hearing, each and every aggravating factor in § 13-11-6 and each and every mitigating factor in § 13-11-7, as well as giving the prosecution and defense an opportunity

> to present any evidence, documentary or otherwise, as well as to present arguments, as envisioned under § 13-11-3."

Ritter v. State, 429 So.2d at 935-36.

We emphasize that the trial court must conduct a separate sentencing hearing, which is independent of the guilt phase of the proceeding. Section 13-11-4 requires the court to weigh all of the aggravating circumstances against all of the mitigating circumstances, and make its sentencing determination. The court shall either sentence the defendant to death, and necessarily accept the jury's sentence, or sentence the defendant to life imprisonment without parole, and necessarily reject the jury sentence.

We hold that the sentencing procedure under the 1975 Death Penalty Act is constitutional, even though the jury has no discretion in sentencing. The statute is saved by

the fact that the court, which is the sentencing authority, considers the circumstances of the offender, i.e., the aggravating and mitigating circumstances, in a separate and independent sentencing hearing, and then imposes the sentence.

In Beck v. State, 396 So.2d 645 (Ala. 1980), we held that a defendant accused of a capital crime should thereafter receive a bifurcated trial. We were concerned that, absent the preclusion clause, a jury would refuse to convict a defendant of a capital crime proven beyond a reasonable doubt because of the enormity of the sentence and the apparently mandatory nature of the death sentence. The bifurcated trial eliminates this "risk that the jury will use its power to decide guilt to make a de facto punishment decision." Beck v. State, 396 So.2d at 660.

However, it has never been held that all defendants sentenced under the 1975 act must be resentenced in accordance with the procedure set out in Beck v. State, supra. The United States Supreme Court (Stewart, Powell, and Stevens, JJ.), in Gregg v. Georgia, 428 U.S. 153 (1976), stated:

> "We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns."

Gregg v. Georgia, 428 U.S. at 195.

We accordingly hold that petitioner is not entitled to be resentenced under Beck v. State, supra. The risk with which we were concerned in Beck was not present at petitioner's trial. He was not entitled to an instruction on a lesser included offense.

The jury could either acquit or convict him of the capital offense. Even though the jury was instructed to sentence him to death if it found him guilty, it convicted him. He was not prejudiced by the fact that the jury had no discretion to consider any sentence except death. True, he could have been sentenced to life without parole by the trial judge, who had that decision to make, since he was not bound by the jury's sentence.

V.

Petitioner argues that the trial judge improperly considered two prior juvenile adjudications, rendered in the state of North Carolina, as aggravating circumstances in support of the death sentence.

The Court of Criminal Appeals addressed this issue and held that it was improper to consider one of the prior adjudications.

That court found that the elimination of this one, non-statutory, aggravating circumstance did not affect the balance. It was convinced that the sentencing judge would have sentenced petitioner to death, even absent this aggravating circumstance. Having found the error to be harmless error, it affirmed the sentence of death. Baldwin v. State, ___ So.2d at ___ (Ala.Crim.App. 1983).

We have studied the record and the opinion of the Court of Criminal Appeals, and we agree. We would be hard pressed to improve upon the opinion of the Court of Criminal Appeals and, therefore, we adopt that part of it which is addressed to this issue, and we affirm the sentence.

VI.

The sentence of death was not imposed in an arbitrary or capricious manner, nor was

it handed down under the influence of passion or prejudice. The sentence was appropriate, as the aggravating circumstances greatly outweighed the mitigating circumstances. We take judicial notice that other defendants convicted of this offense have also received sentences of death. Most notably, Edward Horsley, petitioner's accomplice, has been sentenced to death. Horsley v. State, [MS. November 29, 1983] ___ So.2d ___ (Ala.Crim.App. 1983).

Accordingly, the conviction of petitioner and the sentence of death are affirmed.

AFFIRMED.

Torbert, C. J., Maddox, Faulkner, Almon, Shores, Embry, and Adams, JJ., concur.

Jones, J., concurs in part and dissents in part.

Beatty, J., dissents.

JONES, JUSTICE (concurring in part and dissenting in part).

I dissent only as to Part IV--that portion of the opinion relating to the sentencing phase of the trial. In other words, I would affirm as to all aspects of the appeal except that I would reverse the sentence and remand to the Court of Criminal Appeals with instructions to remand to the trial court for a new sentencing hearing. Consistent with the views expressed in my dissent in Ritter,[1] with which Justices Maddox and Adams concurred (and also consistent with Justice Maddox's special concurring opinion on rehearing,[2] in which I, along with

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[1]Ritter v. State, 403 So.2d 155 (Ala. 1981).

[2]The characterization of Justice Maddox's opinion as "concurring specially in denial of rehearing" is an obvious inadvertence and

(footnote continued on following page)

Justice Adams, concurred), I believe the restructured, bifurcated proceedings established by this Court in Beck upon remand require a new sentencing hearing. Beck v. State, 396 So.2d 645 (Ala. 1980) (Beck II).

I do not reach the constitutional question addressed by Judge Johnson, writing for the 11th United States Circuit Court of Appeals in Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984), holding Alabama's pre-Beck II mandatory death sentence by the jury, in the event of a guilty verdict, constitutionally defective. These considerations

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not in keeping with the content of his opinion. His opinion reinforces what I had written in dissent on original deliverance. Because three Justices (Maddox, Adams, and I) would not have reversed the conviction, we necessarily addressed the validity of the sentence issue. Because the majority was reversing and remanding for a new trial as to both the conviction and the sentence, it had no occasion to address the separate issue of whether Ritter was entitled to a new trial as to the sentencing phase only.

are not of primary concern from the standpoint of State law, however, in light of Alabama's statutory scheme of sentencing, as judicially modified by Beck II upon remand.

Because the trial judge is the ultimate sentencing authority, reasons the majority, the mandatory death sentence imposed by the jury is of no consequence (i.e., such procedure is not prejudicial error), where the conviction is due to stand for lack of a meritorious lesser included offense challenge.

In my opinion, this overlooks the statutory scheme (unchanged by this Court's Beck II opinion) that gives the jury a vital role in the sentencing process. It may well be that, under the United States Supreme Court's guidelines for administering the death penalty, the statutory scheme would meet federal constitutional muster if the jury's role in the sentencing process had

been omitted altogether (assuming, of course, that the statute prescribes an appropriate bifurcated sentencing hearing before the trial judge). But it was not omitted. Indeed, the trial judge is statutorily mandated to consider the jury's verdict of sentence. Under pre-Beck II law, only by acquitting the defendant was the jury authorized to render any verdict other than death. In other words, Baldwin's jury could either find him not guilty, or find him guilty and sentence him to die.

If one of the factors that the trial judge must duly consider in the exercise of his sentencing prerogative is the sentence pronounced by the jury, then, under the pre-Beck II mandatory sentencing procedure, that judicial consideration is necessarily confined to the jury's sentence of death. It is not a matter of not trusting the trial judge to exercise his independent judgment,

just the opposite. To be sure, I trust our State trial judges to follow the spirit, as well as the explicit mandate, of the statute requiring them to give due consideration to the jury's pronouncement of sentence, and to exercise their independent judgment accordingly.

Obviously, the legislature, in retaining the jury's role in the two-step sentencing process, intended for the trial judge, as the final sentencing authority, to have the benefit of the community's input as expressed in the jury's "recommendation" of sentence. That legislative will--as a due process requisite--is thwarted where the jury is legally bound to "recommend" only the death penalty.

BEATTY, JUSTICE (dissenting):

I adhere to my dissent express in Baldwin I, 372 So.2d 32 (Ala. 1979).